92-816

Supreme Court, U.S.
FILED
NOV 9 1992
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In the
Supreme Court of the United States

No.

D.R., a minor child, by her parent and natural guardian, L.R., and L.R., individually and in her own right
and
L.H., Bucks County, Pennsylvania,

Petitioners,

v.

MIDDLE BUCKS AREA VOCATIONAL TECHNICAL SCHOOL; WILLIAM GOODE; JAMES C. BAZZEL; MARTHA RICHINO; SUSAN PETERS; BUCKS COUNTY INTERMEDIATE UNIT NO. 22; CHRISTINA TUTTLE; PENN RIDGE SCHOOL DISTRICT; CHARLES FAMBRO; FRED FREEMAN; JAMES A. GALLAGHER; BRIAN MILLER; MARC R. RATCLIFFE; JAMES M. SPERLING; LESTER SUTPHIN

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NOS. 90-3018 and 90-3060

D.R., a minor child, by her parent
and natural guardian, L.R. and L.R.,
individually and in her own right,

v.

MIDDLE BUCKS AREA VOCATIONAL
TECHNICAL SCHOOL, et al.

and

L.H., BUCKS COUNTY, PA.

v.

MIDDLE BUCKS AREA VOCATIONAL
TECHNICAL SCHOOL, et al.

MEMORANDUM

GILES, J. FEBRUARY 1, 1991

Plaintiffs have sued several public school entities and school-related individuals for alleged violations of their constitutional rights under 42 U.S.C. § 1983 and several other federal statutes, as well as under state law. Defendants have moved to dismiss the complaint against them pursuant to Fed. R. Civ. P. 12(b)(6). (Penn Ridge School District, Bucks County Intermediate Unit No. 22, Middle Bucks Area Vocational Technical School, and teachers and officials individually sued will collectively be referred to as "school defendants").

BACKGROUND

The facts as averred by plaintiffs, which this court must accept as true for the purpose of deciding the motions, are

disturbing. Plaintiffs allege sexual molestation by fellow students ("student defendants") over a period of months and allege that their classroom was left so uncontrolled by the student teacher, that the student defendants seized opportunities to commit the alleged offenses. No doubt exists that plaintiffs may maintain a state court action against these students.

However, whether plaintiffs have alleged sufficient facts to give rise to a federal civil rights action against the school that they attended, the several school districts which transferred them, and teachers and administrators within them, is the central question in this motion. School defendants' liability must be premised upon conduct that is more than gross negligence. Nothing short of reckless indifference by school defendants will allow plaintiffs' suits to proceed.

In their amended complaints plaintiffs allege violations of 42 U.S.C. §§ 1983, 1985(3), 1986 and 1988 in counts I through IV, claiming that the school defendants breached a duty of care to them by knowingly and recklessly engaging in acts or omitting acts that led to their injuries.

Counts V, VI, VII, VIII and IX allege violations of state law for the alleged acts of the students individually and against the school defendants. The handicapped plaintiff, D.R., claims that she was entitled to the benefits of the Education of All Handicapped Children Act, 20 U.S.C. § 1411 *et seq* and that the school defendants were required to provide special classes for her pursuant to 24 Pa. Cons. Stat. Ann. § 13-1372. Additionally, she claims that the school defendants breached a duty to report the alleged abuse pursuant to 11 Pa. Cons. Stat. Ann. § 2204 and § 2205.[1]

1. After hearing oral argument on defendants' motions to dismiss plaintiffs' first complaints, it was determined that recklessness was not evidenced on the face of the pleadings. The court allowed plaintiffs to amend their complaints to conform to the specificity requirements of the civil rights statutes. Additionally, plaintiffs were required to brief their 42 U.S.C. § 1985(3) claims. Plaintiffs filed amended complaints and the school defendants renewed their motions to dismiss.

Defendants Penn Ridge School District ("Penn Ridge") and Bucks County Intermediate Unit No. 22 ("Unit No. 22") made arrangements for plaintiff D.R., an "exceptional" or handicapped student within the meaning of 24 Pa. Cons. Stat. Ann. §§ 13-1371, 13-1373, to take graphics occupation classes at the Middle Bucks Area Vocational Technical School (Middle Bucks). Plaintiff, L.H. was not an "exceptional" child, but was enrolled in the same graphics class. She has not sued Penn Ridge or Unit No. 22.

Plaintiffs allege that some student defendants in the graphics class physically abused them through forcible and offensive sexual contact. Specifically, those students allegedly touched their breasts and genitalia, sodomized them, forced them to touch the genitalia of the student defendants, forced plaintiffs to perform acts of fellatio, forced plaintiffs to watch similar acts performed on other female students and forced plaintiffs to watch while the student defendants offensively, but non-sexually, touched their teacher, defendant Susan Peters.

Plaintiffs were required to attempt to plead: 1) every date of non-consensual sexual contact, 2) the students who perpetrated each separate contact, 3) where each contact occurred, 4) who witnessed the contact, and 5) which school defendant had actual knowledge of the contact that occurred and when.

In direct response to this court's bench order at oral argument, plaintiffs recite more specifically individual incidents of sexual harassment and the perpetrators of those incidents. D.R. Amended Complaint, ¶¶ 40-45. L.H. Amended Complaint, ¶¶ 35-41.

While not pleading specific dates, plaintiff D.R. avers that from January through April or May of 1989 student defendant James Sperling regularly grabbed her, pulled or carried her into the graphics class bathroom, forcing her to masturbate him. She states that student defendants Marc Ratcliffe, James Gallagher, Fred Freeman and Brian Miller did the same as frequently, during the same time period, in the bathroom or darkroom. From January through May of 1989 she states that student defendant Lester Sutphin repeatedly

requested that she masturbate him. She also charges that these student defendants helped each other complete the crimes allegedly committed against her. She asserts that these student defendants assaulted her two to four times a week between January and May of 1989. D.R. Amended Complaint, ¶¶ 40-44. She made no complaint to any school teacher, official or defendant.

Plaintiff L.H. states that, beginning in December of 1988, student defendant Brian Miller attempted to force her to masturbate him in the graphics class bathroom, and that on another occasion in December of that year was successful in this molestation. She states that he succeeded in molesting her in this way two to three times a week between December and mid-March of 1989. Student defendants Marc Ratcliffe, James Gallagher, Charles Fambro and Fred Freeman allegedly committed the same kind of acts against her from January to March or May of 1989. L.H. Amended Complaint, ¶¶ 38-41.

Neither plaintiff states that a school defendant witnessed any of the forcible contact. They merely state that defendant Peters was or should have been present in the classroom when each attack occurred and did or should have heard each incident taking place. (D.R. Amended Complaint, ¶ 47, L.H. Amended Complaint, ¶ 43).

Plaintiffs state that school defendants had a duty to protect them while in their care, custody and control and to report any abuse of plaintiffs. (D.R. Amended Complaint, ¶¶ 28 and 31, L.H. Amended Complaint, ¶¶ 24 and 26). Additionally, they aver that student defendants had behavioral problems throughout the 1988-1989 school year and that school defendants had actual knowledge of this. (D.R. Amended Complaint, ¶ 38, L.H. Amended Complaint, ¶ 33). They add that defendant Peters was not properly trained to teach or protect students. (D.R. Amended Complaint, ¶ 36, L.H. Amended Complaint, ¶ 31).

LEGAL STANDARD

Under Rule 12(b)(6), a motion to dismiss for failure to state

a claim upon which relief may be granted can only be granted if "it appears beyond doubt" that the plaintiffs can prove no set of facts in support of claims which would warrant relief. *Conley v. Gibson*, 355 U.S. 41 (1957). This court must accept as true all of plaintiffs' factual allegations that are well pled, and draw from them all reasonable inferences favorable to the non-moving party. *Scheurer v. Rhodes*, 416 U.S. 232, 236 (1974); *D. P. Enterprises, Inc. v. Bucks County Community College*, 725 F.2d 943, 944 (3d Cir. 1984).

To recover in a § 1983 action plaintiffs must show that defendants deprived them of a right secured by the Constitution of the United States while acting under the color of state law. *See Riley v. Jeffes*, 777 F.2d 143, 145 (3d Cir. 1985). Negligent conduct is not actionable under § 1983. Defendant must have acted or refused to act with deliberate indifference to the rights of the injured party. *Colburn*, 838 F.2d at 668.

Complaints under civil rights statutes must plead facts with greater specificity than is generally required. *Colburn v. Upper Darby Township*, 838 F.2d 663, 666 (3d Cir. 1988). "[T]he heightened specificity requirement for section 1983 claims does not alter the general standard for ruling on motions to dismiss under 12(b)(6)... [T]he crucial questions are whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer." *Id.*

LEGAL ANALYSIS

In the original motions to dismiss some school defendants claimed that they were immune from suit pursuant to the eleventh amendment of the U.S. Constitution as arms of the state and that a school district is not a "person" within the meaning of § 1983. Alternatively, they claimed that plaintiffs' actions against them were barred by governmental immunity protection provided in the Political Subdivision Tort Claims Act, 42 Pa. Cons. Stat. Ann. § 8541 *et seq* (Purdon 1982). Because some of the school defendants renewed these claims, after this court allowed plaintiffs to amend their complaints, the court will address them.

1. Eleventh Amendment Immunity:

The third circuit ruled recently that Pennsylvania school districts are not alter egos of the Commonwealth and, therefore, do not acquire eleventh amendment immunity in suits for special education services. *Lester H. v. Gilhool*, slip op. 89-2046 at pg. 13 (Sept. 27, 1990).

Even if defendant attempted to distinguish this case from *Lester H.*, the argument would be unsupported by Pennsylvania law. Eleventh amendment immunity bars suit in federal court against a State and its officials under certain circumstances. *See Edelman v. Jordan*, 415 U.S. 651 (1974). However, municipal corporations do not have eleventh amendment protection. *Moor v. County of Alameda*, 411 U.S. 693, 717-21 (1973). The Supreme Court has determined that, under certain circumstances, a school district may be considered a municipal corporation or a political subdivision that qualifies for municipal corporation treatment. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1976).

In *Mt. Healthy* the Court held that an Ohio school district could not invoke eleventh amendment immunity. By looking to state law, it determined that the school district was a "political subdivision" and that as such it was not included in the definition of "State." *Id.* Although it was "subject to some guidance from the State Board of Education" and received "a significant amount of money from the State", it had "extensive powers to issue bonds [citation omitted], and to levy taxes" and, therefore, "[o]n balance" the school district was "more like a county or city than . . . an arm of the State." *Id.*

In Pennsylvania, school districts are technically agencies of the state, created to promote education. *Northwestern School Dist. v. Pittenger*, 397 F.Supp. 975, 979 (1975). However, they have been considered quasi-municipal corporations. *Smith v. School Dist. of Philadelphia*, 334 Pa. 197, 202, 5 A.2d 535, ___ (1939); *Borough of Wilkinsburg v. School Dist. of Wilkinsburg*, 365 Pa. 254, 257, 74 A.2d 138, ___ (1950); *See Southwest Delaware Cty. Municipal Authority v. Aston Tp.*, 413 Pa. 526, 198 A.2d 867 (1964). Furthermore, historically Pennsylvania courts treated school districts as municipal cor-

porations for purposes of tort liability. *See Morris v. Mt. Lebanon Twp. School Dist.*, 393 Pa. 633 (1958); *See Also Shields v. Pittsburgh School Dist.*, 408 Pa. 388 (1962). The legislature has also treated them as municipal corporations or political subdivisions for tort liability purposes by including them under the Political Subdivision Tort Claims Act, 42 Pa. Cons. Stat. Ann. § 8541 *et seq* (Purdon 1982).

While it is true that 53 Pa. Cons. Stat. Ann. § 1-102 defines "municipality" as "county, city, borough, incorporated town or township", omitting "school district" from the definition this fact is not determinative of whether a school district is considered a municipal or quasi-municipal corporation. Section 2-211, 24 Pa. Cons. Stat. Ann. (Purdon 1982), states that "[t]he several school districts in this Commonwealth shall be . . . bodies corporate, with all necessary powers to enable them to carry out the provisions of this act."

School boards have broad powers to levy taxes in a given school district to supplement state funds. 24 Pa. Cons. Stat. Ann. § 6-602 (Purdon 1982). Moreover, school districts have some power to issue bonds to secure corporate indebtedness. *Wilson v. School Dist. of Philadelphia*, 328 Pa. 225, 249, 195 A. 90, (1937). The Local Government Unit Debt Act, 53 Pa. Cons. Stat. Ann. § 6780 *et seq* (Purdon 1982), covers school districts as included in the definition of "Local Government Unit". 53 Pa. Cons. Stat. Ann. § 6780-1(10). Local government units may issue bonds for the payment of unfunded debt. *See Id.* § 6780-209—301.

Additionally, the school district itself, not the State, is responsible for paying any judgments against it. Although the payment comes indirectly from state funds, the State is not the judgment debtor. *See* 24 Pa. Cons. Stat. Ann. § 6-611 (Purdon 1982).

Because school districts in Pennsylvania are considered political subdivisions or quasi-municipal corporations and have power to levy taxes and issue bonds, they are more analogous to municipalities, as discussed in *Mt. Healthy*. Therefore, defendant has no claim to eleventh amendment immunity.

However, school districts are protected from suit to some degree by Pennsylvania's governmental immunity statute.

2. Governmental Immunity:

Pennsylvania's governmental immunity statute, 42 Pa. Cons. Stat. Ann. § 8541 *et seq* (Purdon 1982), provides:

> Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.

Schools and school districts are local agencies accorded governmental immunity pursuant to this provision. *See Henley v. Octorara Area School Dist.*, 701 F.Supp. 545, 552-3 (E.D.Pa. 1988); *See also Cotter v. School Dist. of Phila.*, 562 A.2d 1029, 1031 (Pa. Cmwlth 1989). However, it does not protect schools or school districts from suit for alleged violations of civil and constitutional rights. *Martinez v. Califano*, 444 U.S. 227, 284, n. 8 (1980); *Wade v. City of Phila.*, 765 F.2d 405, 407 (3d Cir. 1985); *Bushkirk v. Seiple*, 560 F.Supp. 247, 250-1 (E.D.Pa. 1983) Therefore, plaintiffs may maintain a suit under § 1983 against defendants if they state a proper claim upon which relief can be granted.

3. 42 U.S.C. § 1983:

A. The School Districts

Municipalities have been deemed persons for § 1983 purposes and, therefore, defendants may be sued as entities tantamount to a municipality. *See Monell v. New York Dept. of Social Services*, 436 U.S. 658, 690 (1978). However, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory. *Id.* at 691. Thus, a school district cannot be liable under § 1983 based on an act or omission of a school employee that injures another that was not caused by some policy or custom of the school. *See Id.* at 691. Here, plaintiffs must allege that the school districts were reckless, actually abandoning a known duty to plaintiffs through a policy or

custom. The policy complained of must be a proximate cause of the constitutional violation alleged. Therefore, even assuming that defendants have an affirmative duty to protect students, plaintiffs must allege a nexus between a policy, which was recklessly indifferent to their well being, and the injury suffered. *Id.* Otherwise, any theory of liability against the school districts would amount to *respondeat superior* and would not be actionable under § 1983. Here, plaintiffs have not stated a custom, policy or practice of school defendants violative of their rights.

An absence of a policy may also be actionable. Following the rationale of prisoner and detainee cases, which provide the actionable duty here, plaintiffs must show that the absence of a policy to address the special needs of those who may be abused by fellow classmates is actionable under § 1983. *See Hudson v. Palmer*, 468 U.S. 517, [526-27] (1984); *Colburn*, 838 F.2d at 669.

Obviously, a school district must have breached a duty to protect its students before it can be held liable for injuries students suffer while in school. An open question exists as to whether a school or school district has an affirmative duty to protect students from other students.

In *Deshaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 57 U.S.L.W. 4218 (1989), the Supreme Court held that the state had no affirmative duty to protect the life, liberty or property of citizens from private actors. *Id.* at , 57 U.S.L.W. at 4219. There, the state had not removed a child from his father's custody, although it received repeated reports of abuse. Subsequently, the father beat the boy into a coma and the boy's mother sued the state under § 1983. The Supreme Court reasoned that no special relationship existed between the state and the boy which gave rise to a duty to protect him from his father.

The Court remanded *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720 (3d Cir. 1989) (*Stoneking II*), to the third circuit for reconsideration of its earlier judgment (*Stoneking I*, 856 F.2d 594 (3d Cir. 1986)) in light of *Deshaney*. In *Stoneking I & II* a former student sued the school district and other

officials at her school under § 1983 for sexual abuse perpetrated by one of her teachers. The third circuit held that *Deshaney* did not preclude "liability [of state officials] arising from policies maintained in deliberate indifference to actions taken by their subordinates." *Stoneking II*, 882 F.2d at 725. Liability for such a policy is not dependent upon the existence of a "special relationship" between the officials and the individual who sustained injuries due to the policy. *Id.*

The acts complained of here were not perpetrated by a teacher, but rather by students who were not state actors. The fact that the perpetrator of the abusive act was a school employee was the linchpin of the third circuit's decision in *Stoneking II*. This case lacks that linchpin. Therefore, it must be determined whether a special relationship existed between plaintiffs and the school defendants.

Arguably, this case is analogous to involuntary custody cases where states have been found to have a duty to protect those in its custody. *See, City of Revere v. Ma. General Hosp.*, 463 U.S. 239 (1983); *See, e.g., Youngberg v. Romeo*, 457 U.S. 307 (1982). In *Deshaney*, the Supreme Court suggested that the state may be liable for failure to protect children in foster care homes, in line with cases holding that states have a duty to protect those held against their will, such as prisoners and the institutionalized mentally ill, from themselves and others. *Deshaney* 489 U.S. at , 57 U.S.L.W. at 4221 n. 9.

Plaintiffs argue that they were required by state law to attend school and, therefore, were subject to the custody of the institution during school hours. This court agrees. Plaintiffs were required by state law to attend school, 24 Pa. Cons. Stat. Ann. §§ 13-1327, 13-1333 and 13-1343 (Purdon 1982), and as public school students, were also required to attend the classes designated by the school district in which they resided. The control school defendants are legally required to assert over students in their custody suggests that they should have an affirmative duty of protection. 24 Pa. Cons. Stat. Ann. § 13-1317 (Purdon 1982).

Section 13-1317 gives teachers and principals the same control over students' behavior, during school hours, that

their parents would have. School officials' standing *in loco parentis* permit the exercise of such control reasonably necessary to prevent disciplinary infractions and interference with the educational process. Such discipline may include corporal punishment. *Glaser v. Marietta*, 351 F.Supp. 555 (D.D.C. 1972).

Because school districts do have a duty to protect students from each other while on school property, during school hours, this court must determine whether the school districts in question recklessly abandoned this duty.[2] Plaintiffs do not allege that a written policy existed which caused them harm. Thus, they must have alleged a custom which resulted in the violation of their rights. One way to demonstrate that a custom existed is to allege facts showing that the school district knew or must have known that perpetrator defendants were molesting plaintiffs. They could provide facts which demonstrate that student defendants had a propensity to commit such crimes and that the school district had knowledge or should have known of the propensity.

Simply alleging that the students who attacked them had behavioral problems is insufficient to show that the school should have known that they might commit the acts alleged here. Plaintiffs' allegations permit only the inference that the school defendants had actual knowledge of student behavior which, at worst, could be described as non-criminal horseplay.

During classroom hours, student defendants: jumped around, played "hacky-sack", played their walkmans, smoked cigarettes, hid under their desks, touched and grabbed female students, and on one occasion started a small fire. In February of 1989 student defendant Brian Miller pushed a metal pole through a window, breaking it, and also spit and put wax in a female student's hair. Clearly, all of these acts

2. One may argue that the school districts could not be said to have abandoned a known duty to protect students from fellow students under the circumstances here at issue, since the law in this area is unsettled. This court will not address this argument because the facts as pled do not give rise to a § 1983 action.

constitute inappropriate and incorrigible classroom behavior. Yet, one cannot infer from these events that the school defendants were bound to have known that the student defendants were criminal sexual molesters.

The allegations that the student defendants touched, grabbed or even hit their female classmates do not in themselves state facts sufficient to impute knowledge to school district defendants of likely criminal sexual molestation. Even if the students accused of molesting plaintiffs committed nonsexual violent acts against female students with the knowledge of the school districts, the commission of those acts alone would not be evidence of the students' propensity to rape or sexually molest. Plaintiffs have not alleged that the touching actually observed in the open classroom was nonconsensual.

Plaintiffs allege that from January through May 4, 1989 student defendants Marc Ratcliffe, Charles Fambro, James Gallagher, Fred Freeman and Lester Sutphin uttered profanities and obscenities in class, did not do their work, threw materials around the classroom, roughhoused, teased D.R. by throwing her purse and sweater to the ground, stepping on them, put their hands on her face or the computer screen and made lewd gestures to her. D.R. Amended Complaint, ¶ 38(a)-(n). L.H. Amended Complaint, ¶ 33(a)-(m).

Again, these incidents evidence bad behavior, not a propensity to rape such that the school district defendants could be liable for reckless disregard of a duty to protect against sexual molestation. The strongest of these allegations involved videotapes made in the graphics class. In a March 1989 videotape, plaintiffs allege that student defendants videotaped forcibly at least one female student, submitting her to questions about sex, by pinning her down in a locked darkroom for thirty to forty-five minutes. In another videotape, student defendants filmed themselves touching and grabbing female students and displayed signs on which profanity was written, and one defendant mooned the camera.

Plaintiffs have not alleged that any school defendants

viewed the videotapes or had actual knowledge of their contents.

Other acts of student defendants of which plaintiffs state that school defendants had actual knowledge amount to profanity, "rough housing" and watching a Jane Fonda videotape for personal sexual gratification. Profanity and rambunctiousness fall into the category of behavior much lower than the specific criminal acts of which student defendants stand accused. Viewing the workout tape for sexual gratification does not demonstrate propensity to assault sexually other students.

D.R. states that defendant students knocked her sweater and purse to the floor and that they struck other female students in class. L.H. states that student defendants hit her on various occasions. Additionally, plaintiffs allege that the student defendants offensively, albeit non-sexually, touched defendant Peters. These averments, while violent, are non-sexual in nature.

Plaintiffs assert that the school districts could have taken steps to prevent the attacks on plaintiffs, or to have made the likelihood more difficult. School defendants required only co-ed bathrooms with a lock on the inside of the door and had designed a classroom with areas concealed from the view of the teacher, such as a photography darkroom. According to plaintiffs, these facts created an atmosphere that facilitated sexual abuse. These allegations do not support a finding of actual abandonment of a known duty on the part of the school district. At most, the classroom and bathroom door designs were acts of negligence.

Plaintiffs aver the following to attempt to show that school defendants knew or should have known of the abuse. D.R. states that she screamed or attempted to scream and that defendant Susan Peters, who was or should have been present in the classroom, did not listen to her or take any action to stop the contact from occurring. This "either-or" pleading is not an allegation that Peters was in the classroom or heard the scream.

At other times Peters was allegedly aware that several stu-

dents in the graphics class were not in the theory room or work area and that on those occasions she should have known that male and female students were in the bathroom together. D.R. avers that beginning in February of 1989, Peters asked students on various occasions what was occurring in the bathroom and that she was told that D.R. was in there with male students. D.R. Amended Complaint, ¶ 49. L.H. makes the same allegation in paragraph 45 of her amended complaint. Plaintiffs also aver that Peters would leave the room or turn her head away intentionally when students were in the bathroom together. D.R. Amended Complaint, ¶ 57. L.H. Amended Complaint, ¶ 51. Moreover, they allege that Peters told the administration in February of 1989 that there was a problem with students being in the bathroom. D.R. Amended Complaint, ¶ 57, L.H. Amended Complaint, ¶ 49.

These allegations show that Peters failed to investigate the bathroom occupations. However, they do not support a necessary contention that students were not consensually in the bathroom and that Peters knew it. None of the plaintiffs complained to Peters about sexual assault or fears.

D.R. asserts that at the end of March or beginning of April 1989, in a meeting with Peters, Ms. Bugaski, a teacher at Penn Ridge, and Ms. Rogers, the coordinator for Unit No. 22 students, D.R.'s mother informed them that a student, Renee, had told her that bad things were happening in the classroom. D.R. Amended Complaint, ¶ 61.

L.H. states that in December of 1988, she informed defendant Bazzel, Assistant Director of the Middle Bucks Vocational School, that perpetrator defendant Miller "was trying to force her to masturbate him in the bathroom of the graphic arts classroom." L.H. Amended Complaint, ¶ 36. On another occasion Dena Brosko, a student in the class, allegedly told Mrs. Carson, a substitute teacher, that, "things were going on in the bathroom" and that Trina Ann Schuleyer, another student in the class, told Mrs. Moyer, a teacher, what was going on in the graphics class bathroom. L.H. Amended Complaint, ¶¶ 54 and 55, respectively.

Arguably, the facts may show that defendants' lack of a policy amounted to a policy of being lax about a recurring problem. The third circuit has stated that "an official policy may be inferred from informal acts or omissions of supervisory municipal officers." *Colburn*, 838 F.2d at 671, *citing Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 506 (3d Cir. 1985). Here, those officers would be teachers and administrators of the school districts sued.

Plaintiffs' argument that such a policy of laxity existed is dependent upon establishing that there were prior incidents of sexual assault known to the school defendants, perpetrated by the student defendants. Such a showing would suggest that defendants knew, or should have known, that their supervision of students was inadequate.

While plaintiffs allege wild behavior on the part of the student defendants and a suggestion that defendants Peters and Tuttle knew that something was occurring in the graphics class bathroom, they have alleged no reports of sexual molestation prior to May 4, 1989, except one. L.H. states that she told defendant Bazzel in December of 1988 that perpetrator defendant Miller had attempted to force her to masturbate him in the graphics class bathroom and that defendant Bazzel took no disciplinary or other action against Miller. L.H., who is not handicapped, did not report to Bazzel that there had been any reoccurrence of the offensive sexual episode or that she would be unable to report any attempted sexual act in the future. There was nothing Bazzel could have done to erase the past act and it would be speculative that he could have done something to prevent that which he did not know would happen in the future.

Plaintiffs did not inform any school defendant or other school official that other students were sexually molesting them. Nor do they allege that any other female students informed the school officials that such events were taking place. Therefore, the allegation that L.H. informed one school official of one past incident perpetrated by one student does support a finding that the school districts themselves had a policy or custom of abandoning a known duty owed to L.H. or

any other female student, even if that school official was derelict in not taking disciplinary action on that occasion.

From their pleading that the individual school defendants knew "something bad" was happening in the bathroom, one may reasonably infer that these defendants had a duty to investigate. However, their failure to do so, does not create municipal or school district liability. As the third circuit stated, "the allegation that defendants failed to supervise and monitor adequately . . . alone might not satisfy our requirement for a 'modicum of factual specificity'" *Colburn*, 838 F.2d at 672. The same is true in this case.

The question remains whether a § 1983 suit may be maintained against any of the school defendants individually.

B. Qualified Immunity under § 1983

Defendants Peters, Goode, the Director of Middle Bucks, and Bazzel, the Assistant Director of Middle Bucks, argue that the complaints against them must be dismissed based on qualified immunity from § 1983 liability. This court agrees. In *Stoneking II*, 882 F.2d at 726, the third circuit stated that a defendant claiming qualified immunity from § 1983 liability must show that his conduct did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known", *citing Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Because plaintiffs have not alleged adequately that defendants' acts or omissions caused plaintiff's injuries, plaintiffs have not sufficiently alleged that defendants Peters, Bazzel and Goode acted in violation of a clearly established right.

Plaintiffs claim that the individual defendants allowed the sexual abuse to occur without alleging that they were present during the incidents or participated in them. Nor have plaintiffs alleged that the same type of behavior had occurred before the incidents in question. In *Stoneking II*, the defendant teacher was accused of sexually abusing students, which was held to have abused to the students' constitutional rights. *Id.* at 727. Although the right to be free from such molestation is clear, one could not reasonably say that defendants Peters,

Bazzel or Goode should have known that he or she would be held personally liable for another's sexual molestation of a student unless they participated in the act itself or caused it to happen.

This court's discussion of *Deshaney* demonstrates that the law in this area is not fully developed and the question of liability for the acts of another in the school setting remains unclear. That Bazzel may not have notified L.H.'s parents of the incident in a timely fashion, is insufficient without any facts suggesting that this was constitutionally violative in itself. Therefore, defendant Bazzel, as well as the other defendants, are entitled to qualified immunity from § 1983 liability. Furthermore, plaintiffs' action could not be maintained against any of these defendants on the facts provided even if they did not have qualified immunity from suit.

C. Susan Peters

Many of the facts plaintiffs assert to demonstrate that school defendants knew or should have known that female students in the graphics class needed protection from fellow students relate to defendant Peters. D.R. states that she would scream or attempt to scream when student defendants would grab her and that defendant Peters did or should have heard her screams or was or should have been present in the classroom when the attacks took place. D.R. claims that defendant Peters did not listen to her or take any action to stop the contact from occurring.

At other times defendant Peters allegedly was aware that several students in the graphics class were not in the theory room or work area and that on these occasions she should have known that male and female students were in the bathroom together. D.R. avers that defendant Peters asked students on various occasions what was occurring in the bathroom beginning in February of 1989 and that she was told that D.R. was in there with male students. D.R. Amended Complaint, ¶ 49. L.H. makes the same allegation in paragraph 45 of her amended complaint.

Plaintiffs also aver that defendant Peters would leave the

room or turn her head away intentionally when students were in the bathroom together. D.R. Amended Complaint, ¶ 57. L.H. Amended Complaint, ¶ 51. Moreover, they allege that defendant Peters told the administration in February of 1989 that there was a problem with students being in the bathroom. D.R. Amended Complaint, ¶ 57, L.H. Amended Complaint, ¶ 49.

D.R. alleges that student defendants grabbed her, picked her up or dragged her into the bathroom or darkroom, during class hours. Plaintiffs allege that the attacks occurred over several months, but plaintiffs do not state with specificity that they were forced into the bathroom while defendant Peters was present or that Peters witnessed any of these incidents. They state that she was or should have been present and saw or should have seen student defendants pulling on plaintiffs. D.R. Amended Complaint, ¶ 47. L.H. Amended Complaint, ¶ 43. This form of pleading suggests that they do not know and cannot prove that Peters was present during the incidents or that she witnessed the alleged occurrences.

Plaintiffs allege that Peters sometimes deliberately turned her head or left the classroom, raising speculation that she was aware that something unpleasant was occurring and overlooked it. D.R. Amended Complaint, ¶ 56. L.H. Amended Complaint, ¶ 51. Yet, plaintiffs have not alleged facts from which it can be fairly inferred that she actually knew that the female students were being criminally molested. She may have ignored generally disruptive student behavior, but that is a far cry from a sufficient factual allegation of tolerating known sexual abuse of students.

Reading the pleadings in a light most favorable to plaintiffs, they allege conduct amounting to negligence, not reckless indifference. The allegations suggest that Peters knew that there were disciplinary problems in the class, even severe disciplinary problems. However, in order to state a claim under § 1983, plaintiffs must plead facts upon which this court could infer that defendant Peters knew or should have known that the plaintiffs or other female students were being criminally molested by student defendants during school hours on

school property, and that she thereafter abandoned a duty to act to protect the plaintiffs.

Plaintiffs have not alleged facts in support of their failure to train claim. *See, LaPlant v. Frazier*, 564 F.Supp. 1095, 1098 (E.D.Pa. 1983); *Tillio v. Montgomery County*, 695 F.Supp. 190, 194 (E.D.Pa. 1988). The fact that some students were uncontrolled does not support a claim that Peters was inadequately trained as a teacher.

D. William Goode

Goode was the Director of Middle Bucks during the time that the incidents of which plaintiffs complain occurred. Plaintiffs allege no facts fairly inferring that he had any specific knowledge that they were being molested. In fact, plaintiffs allege nothing suggesting that he was told that the class was out of control. Thus, plaintiffs cannot maintain a suit against him in his individual capacity.

E. James Bazzel

As discussed previously, L.H. charges Bazzel with knowledge of one incident of attempted molestation perpetrated by student defendant Miller. She states that he did not act on this information about a past act. However, she does not assert that she thereafter reported to Bazzel any other attacks upon her by Miller or by any other students. Thus, while Bazzel's omission of disciplinary acts against Miller may be actionable in negligence, through hindsight it does not rise to the level of reckless indifference of a known present or ongoing danger to D.H. and, therefore, is not actionable under § 1983.

F. Martha Richino

Richino was a counselor at Middle Bucks. Plaintiffs make no allegations that Richino had personal knowledge of any of the incidents alleged in the complaints and, therefore, it cannot be discerned on what theory plaintiffs have sued. Because no claim has been asserted with any specificity, the amended complaint against Richino must be dismissed.

G. Christina Tuttle

Tuttle is also a counselor at Middle Bucks. D.R. complains that Tuttle saw that the student defendants were "rough-housing" on several occasions and admitted this to D.R.'s mother. D.R. Amended Complaint, ¶¶ 59 and 60. Mere knowledge of this type of misbehavior cannot create an inference that Tuttle knew that criminal sexual molestation was occurring in the classroom. Furthermore, it cannot be inferred that she should have known of the incidents of which plaintiffs complain.

On other occasions Tuttle came to the graphics class in search of D.R. and, when told that D.R. was in the bathroom, left without waiting for D.R. to emerge. This allegation cannot permit an inference that D.R. was being molested in the bathroom on those occasions or, if she was, that Tuttle knew it. As to her, too, the amended complaints must be dismissed.

5. 42 U.S.C. §§ 1985(3), 1986 and 1988:

Additionally, plaintiffs sue defendant pursuant to 42 U.S.C. §§ 1985(3), 1986 and 1988. Section 1985(3) provides a cause of action for conspiracy to interfere with one's civil rights. It provides, in pertinent part:

> (3) If two or more persons in any State . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection or the laws, or of equal privileges and immunities under the laws . . . , if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

To state a claim under § 1985(3) plaintiffs must allege the existence of a conspiracy to deprive them of equal protection

of the laws or of their rights and privileges, that the conspiracy was motivated by racial or other class-based invidiously discriminatory animus, that defendant committed an act in furtherance of the conspiracy, and that plaintiffs were injured and deprived of rights guaranteed by the Constitution. *Griffin v. Breckenridge*, 403 U.S. 88, 103-4 (1971); *Bethel v. Jendeco Construction Corp.*, 570 F.2d 1168, 1172-3 (3d Cir. 1978).

The amended complaints state that a conspiracy existed on the part of the school defendants to deprive plaintiffs of rights to equal protection under the law and of privileges and immunities of U.S. citizenship. In the memorandum of law that this court requested, plaintiffs claim that the discrimination against them was sex-based.

However, plaintiffs' allegation of conspiracy is not sufficient to provide them with a cause of action under this statute. *See Smith v. Butler*, 507 F.Supp. 952 (E.D.Pa. 1981). The conspirators must have agreed to violate plaintiffs' rights. *Santiago v. City of Philadelphia*, 435 F.Supp. 136 (E.D.Pa. 1977). Plaintiffs allege no facts which suggest even a tacit agreement between the school defendants and the student defendants that allegedly molested plaintiffs. Indeed, the facts plaintiffs allege suggest that no such agreement existed. Defendant Peters complained to school defendants that student defendants were behaving badly. Furthermore, plaintiffs aver that defendant Peters attempted to stop perpetrators from uttering obscenities.

If plaintiffs intended to allege that a policy or custom of school defendants not to discipline students amounted to a conspiracy, they still fail to sufficiently plead § 1985(3) violations, because they do not allege class-based animus.

Plaintiffs state that they are members of the female class and that the class-based animus was sexually discriminatory. Sex-based animus is actionable under § 1985(3). *Frontiero v. Richardson*, 411 U.S. 677, 678 (1973) (plurality opinion). Plaintiffs do not have to allege that all their female classmates were discriminated against, only that they were members of a discernable class within § 1985(3), which they are. *See Gobla v. Crestwood School Dist.*, 609 F.Supp. 972, 980 (E.D.Pa.

1985); *Skadegaard v. Farell*, 578 F.Supp. 1209, 1220 (D.N.J. 1984). Notwithstanding their class membership, they have not alleged that school defendants' reckless indifference was due to this class membership. In other words, they have not alleged facts which raise an inference that they were discriminated against as female students, at least on the part of school defendants.

Arguing that this court cannot dismiss the § 1985(3) claim, they state in their brief in support of this claim that the existence of a conspiracy, as well as class based animus, are questions of fact to be decided at trial. If plaintiffs' statement of the law were correct, it would mean that plaintiffs could simply state that a statute had been violated without alleging any facts to support that the elements of the statute had occurred. Plaintiffs would have no practical burden of pleading. This is clearly not the law.

They cite *Gant v. Aliquippa Borough*, 612 F.Supp. 1139 (W.D.Pa. 1985) to support the argument regarding conspiracy. In *Gant* the court refused to dismiss a plaintiff's § 1985(3) claim where she alleged that a police officer arrested her without justification, beat her and then took her to the police station where other officers questioned her and denied her medical treatment. The court stated that plaintiff pled facts that could, if proven, establish a tacit agreement to violate her rights. *Id.* at 1142. Here, however, no such facts have been supplied.

Cases cited by plaintiffs raise employment discrimination claims where facts were alleged which, if proven at trial, would support a finding of class-based animus. In *Gobla* a female teacher fired from her job sued the school district, alleging that her termination was motivated by her refusal to tolerate sexism. She alleged a history of pervasive discriminatory conduct. In *Skadegaard* a woman fired from her job sued her employer, alleging that she was terminated for refusing to accept her bosses' sexual advances. Plaintiffs do not allege that the school defendants acted in a constitutionally violative way due to plaintiffs' membership in the class.

Because plaintiffs state no claim under § 1985(3), they cannot recover under § 1986. Section 1986 provides a claimant alleging a private conspiracy under § 1985 with a cause of action against anyone who knows that such a violation is going to be committed, has the power to prevent the commission, and fails to do so. As a companion statute, no cause of action can be maintained under § 1986, unless a claim is established pursuant to § 1985. *Rogin v. Bensalem Tp.*, 616 F.2d 680, 696 (3d Cir. 1980).

Additionally, plaintiffs have no cause of action under § 1988, because it provides none. *Moor v. Alameda Cty.*, 411 U.S. 693, *rehearing denied* 412 U.S. 963 (1973). It simply allows a prevailing party in a civil rights suit, including one brought pursuant to §§ 1981, 1982, 1983, 1985 or 1986, to recover attorney's fees. Additionally, the statute requires that a plaintiff prevail on the merits of her claim to obtain attorney's fees. *See Thompson v. Pa. Parole Bd. Member Jefferson*, 544 F.Supp. 173 (E.D.Pa. 1982). Here, plaintiffs are not the prevailing parties.

6. The Education of All Handicapped Act:

The Education of All Handicapped Act, 20 U.S.C. § 1411 *et seq*, does not provide plaintiffs with a cause of action. Plaintiffs state that they had a right to special classes pursuant to this act. Defendants do not deny that they have such a right. However, plaintiffs have alleged no facts tending to show that they were denied access to public education or to special classes.

The purpose of the statute is to provide equal educational opportunities to handicapped children and to help them achieve a reasonable degree of self-sufficiency. *Armstrong v. Kline*, 476 F.Supp. 583 (3d Cir.), *remanded on other grounds* 629 F.2d 269, *cert. denied* 452 U.S. 968 (1979). By alleging that school defendants referred them to the graphics class for vocational training, plaintiffs provide facts that demonstrate school defendants were in compliance with the statute.

The Act provides the handicapped student with an enforceable right to a free and appropriate education. *Andrews v.*

Ledbetter, 880 F.2d 1287 (11th Cir. 1989). However, a court determining whether the state provided an appropriate education does not determine what educational program would be best. *Visco v. School Dist. of Pittsburgh*, 684 F.Supp. 1310 (W.D. Pa. 1988). The crux of plaintiffs' claim is that the behaviorally troubled students alleged to have committed the criminal acts should not have been in a classroom with plaintiffs and the other physically handicapped students. However, without any allegation that these students committed such acts in the past, plaintiffs fail to demonstrate that the educational program itself was not the most appropriate.

Actually, the school district could be liable if it separated these students without some showing that they were not capable of being educated in special classes located in a traditional school. *See Hendricks v. Gilhool*, 709 F.Supp. 1362 (E.D. Pa. 1989).

CONCLUSION

Defendants' Fed.R.Civ.P. 12(b)(6) motions to dismiss plaintiffs' complaints are granted as to plaintiffs' Federal Constitutional and statutory claims. Plaintiffs' state claims are remanded for determination by the appropriate state court.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NOS. 90-3018 and 90-3060

D.R., a minor child, by her parent
and natural guardian, L.R. and L.R.,
individually and in her own right,

v.

MIDDLE BUCKS AREA VOCATIONAL TECHNICAL SCHOOL, et al.

and

L.H., BUCKS COUNTY, PENNSYLVANIA

v.

MIDDLE BUCKS AREA VOCATIONAL TECHNICAL SCHOOL, et al.

ORDER

AND NOW, this 1st day of February, 1991, upon consideration of defendants' motions to dismiss the complaints under Fed.R.Civ.P. 12(b)(6), plaintiffs' response thereto and the replies of the parties, it is hereby ORDERED that defendants' motions are GRANTED. Judgment is hereby entered in favor of defendants and against plaintiffs.

BY THE COURT:

Filed December 31, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-1136 and 91-1137

D.R., a minor child, by her parent
and natural guardian, L.R., and L.R.,
individually and in her own right,

Appellants,

v.

MIDDLE BUCKS AREA VOCATIONAL TECHNICAL SCHOOL; WILLIAM GOODE; JAMES C. BAZZEL; MARTHA RICHINO; SUSAN PETERS; BUCKS COUNTY INTERMEDIATE NO. 22; CHRISTINA TUTTLE; PENN RIDGE SCHOOL DISTRICT; CHARLES FAMBRO; FRED FREEMAN; JAMES A. GALLAGHER; BRIAN MILLER; MARC R. RATCLIFFE; JAMES M. SPERLING; LESTER SUTPHIN

and

L.H., BUCKS COUNTY, PENNSYLVANIA,

Appellant,

v.

MIDDLE BUCKS AREA VOCATIONAL TECHNICAL SCHOOL; AND WILLIAM GOODE AND JAMES C. BAZZEL AND MARTHA RICHINO AND SUSAN PETERS AND JAMES A. GALLAGHER AND BRIAN MILLER AND MARC

R. RATCLIFFE AND JAMES M. SPERLING AND LESTER SUTPHIN

Appeal from the United States District Court
for the Eastern District of Pennsylvania

D.C. Civil No. 90-03018 and 90-03060

Argued July 16, 1991

BEFORE: SLOVITER, *Chief Judge*, GREENBERG and SEITZ, *Circuit Judges*.

Filed: December 31, 1991

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OPINION OF THE COURT

SEITZ, *Circuit Judge*.

Plaintiffs, D.R., a minor child, by her parent, L.R. and L.H., both high school students, as well as L.R. in her own right,[1] appeal the decision and order of the district court dismissing their amended complaints. Future references herein to "plaintiffs" will include only D.R., by her parent and L.H. unless otherwise noted. These complaints asserted claims under 42 U.S.C. §§ 1983, 1985(3), 1986 and 1988[2] as well as state law claims. Federal jurisdiction was asserted under 28 U.S.C. §§ 1341 and 1343 and pendant jurisdiction over the state law claims. This court has jurisdiction pursuant to 28 U.S.C. § 1291.

Because the district court granted defendants' motions to dismiss each of the complaints under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, this court must "accept as true the facts alleged in the amended complaints and all reasonable inferences that can be drawn therefrom." *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir.

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1. Because of our disposition of this appeal, we need not decide whether L. R., the parent of plaintiff D.R., has a legally cognizable constitutional claim in her individual right.

2. The §§ 1986 and 1988 claims are not pressed on appeal.

1990). We therefore turn to the allegations in the amended complaints.

I. AMENDED COMPLAINTS

Plaintiffs were two female students in a graphics arts class at Middle Bucks Area Vocational Technical School ("Middle Bucks").[3] They allege that while attending the arts class for several months during the 1989-90 school year several male students [hereinafter the "student defendants"] in the same class physically, verbally and sexually molested them. This conduct took place primarily in the unisex bathroom and a darkroom, both of which were part of the graphic arts classroom.

Plaintiff, D.R., avers that the student defendants grabbed her and either forced or carried her into the bathroom or darkroom on a regular basis and physically abused her. She asserts that such conduct took place on an average of two to four times per week from January to May of 1990. Plaintiff, L.H., claims that some of the student defendants molested her two to three times per week from December 1989 to May of 1990. Plaintiffs allege that the sexual molestation consisted of offensive touching of their breasts and genitalia, sodomization and forced acts of fellatio. The student defendants also allegedly forced

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3. Plaintiff, D.R., attended graphics occupation classes at Middle Bucks pursuant to an arrangement between defendants Penn Ridge School District ("Penn Ridge") and Bucks County Intermediate Unit No. 22 ("Unit No. 22"). The districts arranged her placement due to her status as an "exceptional" student under Pennsylvania law. 24 Pa. Cons. Stat. Ann. §§ 13-1371, 13-1373 (Purdons 1982).

plaintiffs to watch similar acts performed on other students.

Defendant Susan Peters was the student-teacher in the graphic arts classroom during the time of the conduct in question. Plaintiffs do not claim to have informed Peters of the molestation but assert that Peters was or should have been in the classroom during the time of the acts complained of and either heard or should have heard the incidents taking place. Peters did experience difficulty in controlling the class generally and allegedly was exposed to a variety of misconduct including obscene language and gestures, and physically, but not sexually, offensive touching of females including herself in the main classroom.

Plaintiff, L.H., avers that in December of 1988, she told defendant Bazzel, Assistant Director of Middle Bucks, of an attempt by one student defendant to force her into the darkroom for the purpose of engaging in sexual conduct. She alleges that Bazzel did not take action to correct the situation. Plaintiffs also allege that other individual defendants had knowledge of the severe non-sexual misconduct occurring in the classroom.

Based on the foregoing allegations, the amended complaints assert violations of plaintiffs' civil rights under 42 U.S.C. §§ 1983 and 1985(3) by Middle Bucks, Penn Ridge School District, Bucks County Intermediate Unit No.22, and the teachers and officials individually named [hereinafter the "school defendants"]. The student defendants were also joined. However, since they were not state actors, those claims were properly dismissed by the district court.

II. DISTRICT COURT RULING

On the basis of the record then before it, the district court found that defendants, Goode, Peters and Bazzel were entitled to qualified immunity under section 1983. *D.R., L.R. and L.H. v. Middle Bucks Area Vocational Technical School*, No. 90-03018 and 90-03060, 1991 U.S.Dist. LEXIS 1292 at *17-18 (E.D.Pa. Feb. 1, 1991). Rather than dismissing on that basis, however, the district court's order granted the motions of the defendants to dismiss each of the complaints for failure to state a claim.

The district court first held that a special custodial relationship between plaintiffs and the school defendants was established by virtue of the state's compulsory attendance laws, thus creating an affirmative constitutional duty on the part of the school defendants to protect plaintiffs from the types of acts committed by the student defendants. *D.R.. L.R. and L.H.*, 1991 U.S. Dist. LEXIS 1292 at *27; 24 Pa. Cons. Stat. Ann. §§ 13-1327, 13-1333, 13-1343 (Purdon 1982). The court found that the existence of the affirmative duty to act was complemented by Pennsylvania law which gives school officials *in loco parentis* standing to take any action necessary to prevent disciplinary infractions and educationally disruptive behavior. 24 Pa. Cons. Stat. Ann. § 13-1317 (Purdon 1982). Nevertheless, the court concluded that the amended complaints failed to allege sufficient knowledge on the part of the school defendants to charge them with the requisite reckless indifference to plaintiffs' rights to support a section 1983 claim.

III. DISCUSSION

Plaintiffs contend that their amended complaints alleged the school defendants' knowledge of the physical, verbal and sexual abuse committed by the student defendants and a policy of laxity toward such conduct. They assert that the district court impermissibly narrowed their allegations by focusing solely on the issue of the school defendants' awareness of the sexual misconduct. Thus, as a consequence, they argue that the district court erred in granting the Rule 12(b)(6) motion, given the more expansive allegations and theories presented in their amended complaints.

Appellees respond that the district court's dismissal can be affirmed by this court without reaching the issue of the sufficiency of the factual allegations of the school defendants' knowledge of the conduct of the student defendants. They assert that, contrary to the district court's ruling, no special relationship of constitutional proportions existed between plaintiffs and the school defendants. Thus, they say that this section 1983 action is not maintainable. We turn to that important and complex issue in this most wrenching factual setting.

A. Standard of Review

This court's scope of review of the district court's dismissal for failure to state a claim is plenary. *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990). Construing the pleadings in favor of plaintiffs, we must "determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." *Colburn v. Upper*

Darby Township, 838 F.2d 663, 665-666 (3d Cir. 1988), *cert. denied* 489 U.S. 1065 (1989).

B. Legal Sufficiency of the Complaints

The first issue in a section 1983 case is whether plaintiffs sufficiently allege a deprivation of any right secured by the constitution, *Baker v. McCollan*, 443 U.S. 137, 140 (1978). Plaintiffs' amended complaints essentially assert two theories of liability under § 1983. The first is predicated upon the finding of a special relationship between plaintiffs and the school defendants giving rise to a duty to protect the students such as those here involved. We turn to that issue.

1. Constitutional Duty Analysis

We commence our analysis by addressing one of the seminal Supreme Court cases shedding light on § 1983 liability in this area. In *DeShaney by First v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the Court declined to impose a duty upon a state to protect the life, liberty or property of a citizen from deprivations by private actors absent the existence of a special relationship. *DeShaney* involved the state's repeated receipt of reports of abuse of a minor by his father. Notwithstanding the notice provided by the reports to the state agency, it did not remove the child from his father's custody. The father subsequently beat the child resulting in permanent brain damage. The child and his mother filed a section 1983 action against state officials claiming that their official inaction deprived the minor of his liberty in violation of the fourteenth amendment.

The Supreme Court stated at the outset that the due process clause itself does not impose an affirmative duty upon the state to protect its citizens but rather serves as a limitation on the state's power to act. *Id.* at 195. Further, the Court observed that the purpose of the due process clause "was to protect the people from the State, not to ensure that the State protected them from each other." *Id.* Thus, as a general matter, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197.

The Court went on to acknowledge, however, that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *DeShaney*, 489 U.S. at 198. The Court noted that it first recognized such an exception in *Estelle v. Gamble*, 429 U.S. 97 (1976), *reh. denied*, 429 U.S. 1066 (1977). The Court in *Estelle* held that the state had an affirmative duty to provide adequate medical care for prisoners since incarceration prevents an inmate from caring for himself. *Id.* at 103-04.

The Court extended the *Estelle* exception from the eighth amendment context to a fourteenth amendment due process claim in *Youngberg v. Romeo*, 457 U.S. 307 (1982). It there held that the Constitution imposed a duty upon the state to provide involuntarily committed mental patients "such services as are necessary to ensure their 'reasonable safety' from themselves and others." *DeShaney*, 489 U.S. at 199. The Court also pointed out in *DeShaney*, without editorial comment, that several Courts of Appeals had analogized foster children to individuals who fall within the *Estelle*

and *Youngberg* exceptions. These courts imposed liability on the state for failing to protect children that the state placed in the care of foster parents when such placement resulted in abuse. *DeShaney*, 489 U.S. at 201 n.9.

In commenting on each situation constituting a departure from the general rule the *DeShaney* Court noted:

> [I]t is the State's affirmative act of restraining the individual's freedom to act on his own behalf- through incarceration, institutionalization, or other similar restraint of personal liberty- which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

DeShaney, 489 U.S. at 200. Focusing on the element of restraint, the Court concluded that the *Estelle-Youngberg* exception was inapplicable to Joshua DeShaney's case since the conduct did not occur while the child was in the state's custody.

Although the court decided that Joshua's situation did not amount to state custody, it left open the possibility that the duty owed by a state to prisoners and the institutionalized may also be owed to other categories of persons in custody by means of "similar restraints of personal liberty." *Id.* at 200. We must decide therefore whether, as appellants assert, state compulsory attendance laws so restrain school children's liberty that plaintiffs can be considered to have been in state "custody" during school hours for fourteenth

amendment purposes. We consider this to be an open question in this circuit.[4]

In order to decide whether a special relationship of constitutional proportions exists by virtue of the compulsory school attendance laws, we must attempt to discern the rationale for the *Estelle-Youngberg* exception as articulated by the Supreme Court. In determining that the state did not owe Joshua a duty, the Court in *DeShaney* shed light on what might constitute a special relationship which would give rise to a duty. It found no special relationship between the state and the abused child because the harm occurred while Joshua was in the custody of his father who was not a state actor. Further, the Court noted that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him more vulnerable to them." *DeShaney*, 489 U.S. at 201.

Our court has read *Deshaney* as primarily setting out a test of physical custody. *Philadelphia Police & Fire Ass'n for Handicapped Children, Inc. v. City of Philadelphia*, 874 F.2d 156, 167 (3d Cir. 1989) ("the state continues to owe an affirmative duty to protect those physically in its custody").

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4. This court has suggested that by virtue of the compulsory attendance laws, "students are in what may be viewed as functional custody of the school authorities." *Stoneking v. Bradford Area School District*, 856 F.2d 594, 601 (3d Cir. 1988). In reconsidering that case in light of *DeShaney* on remand from the Supreme Court, however, we stated that "we prefer not to rest our decision again on an affirmative duty to protect such students in this situation...." *Stoneking v. Bradford Area School District*, 882 F.2d 720, 724 (3d Cir. 1989) ("*Stoneking II*").

See also, Fialowski v. Greenwich Home for Children, Inc., 921 F.2d 459 (3d Cir. 1990) (deciding no *Youngberg* duty of care for mentally retarded adult voluntarily placed at institution because state has not substantially curtailed his freedom). The issue in *Philadelphia Police* was whether the state could be held liable for withdrawing vocational and support services provided in a daily program for mentally handicapped children. While admitting that cessation of services would be detrimental to the children, this court refused to expand the *Estelle-Youngberg* custody exception to these children since it was "impossible to find an affirmative duty to protect the mentally retarded living at home." *Id.* at 168. In essence, the court did not "believe that such intermittent custody gives rise to an affirmative duty on the state's part." *Id.* at 168 n.9.

Plaintiffs argue that, unlike the plaintiffs in *Philadelphia Police* who chose to receive state services, they were required by law to attend school and therefore were in the state's custody during school hours under the *Estelle-Youngberg* exception. But the Supreme Court explained that "[t]aken together, [*Estelle* and *Youngberg*] stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney*, 489 U.S. at 199-200. Thus, although plaintiffs' characterization fits in a general way within *DeShaney* characterization of *Estelle-Youngberg*, the similarities go no further.

The state's duty to prisoners and involuntarily committed patients exists because of the severe restriction of liberty in both environments. Institutionalized persons are wholly dependant upon the state for food, shelter, clothing and safety. It is not within their power to provide for themselves, nor are they given the opportunity to seek outside help to meet their basic needs. Obviously, they are not free to leave.

As noted previously, some courts have imposed a constitutional duty to protect foster children by analogy to involuntarily institutionalized individuals. *See, Doe v. New York City Dept. of Social Services*, 649 F.2d 134 (2d Cir. 1981), after remand, 709 F.2d 782, *cert. denied sub nom, Catholic Home Bureau v. Doe*, 464 U.S. 864 (1983); *Taylor by and through Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied sub nom, Ledbetter v. Taylor*, 489 U.S. 1065 (1991). Although the situation of a public school child is closer to that of a foster child than to an institutionalized person, the foster care analogy is not decisive. A special relationship between the state and foster children arises out of the state's affirmative act in finding the children and placing them with state-approved families. *Taylor*, 818 F.2d at 794-97. By so doing, the state assumes pervasive responsibility for the child's well-being. In addition, the child's placement renders him dependant upon the state, through the foster family, to meet his or her basic needs. *Id.* A foster child is completely unable to seek other living arrangements and thus may well fall within the *Estelle-Youngberg* rationale.

Students, on the other hand, do not depend upon the schools to provide for their basic human

needs. Instead, parents or others remain a child's primary caretakers. To the extent that the child is able to take care of himself or herself, attending school does not effectively preempt that responsibility. Schoolchildren, like the institutionalized, may complain to officials, however, unlike prisoners and mental patients, they may also turn on a daily basis to others such as their parents for help. By requiring plaintiffs to attend assigned classes, the school defendants did not cut off all meaningful sources of help for those in plaintiffs' positions.[5] Consequently, plaintiffs' case fails the *DeShaney* test which imposes liability only "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to provide for his basic human needs...." *DeShaney*, 489 U.S. at 200.

We hold that compulsory attendance laws cannot be viewed as creating a special custodial relationship between schools and students akin to that between a state and its prisoners or those otherwise involuntarily committed. Our view is in accord with the only other appellate case to directly confront the issue to date. *J.O. v. Alton Community Unit School Dist. 11*, 909 F.2d 267 (7th Cir. 1990). The Court of Appeals for the Seventh Circuit found that compulsory attendance laws did not liken school children to prisoners and the involuntarily committed, both of whom are unable

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5. We are not required to decide here whether a public school may owe younger students a greater duty of care. *See e.g., Pagano by Pagano v. Massepequa Public Schools*, 714 F. Supp. 641, 643 (E.D.N.Y. 1989) (holding that truancy laws give rise to some duty of care toward elementary students).

to provide for their own basic human needs. Instead, the Seventh Circuit determined that parents have primary responsibility to provide for the basic needs of their children and that both school children and parents "retain substantial freedom to act." *Id.* at 272. We therefore conclude that plaintiffs amended complaints fail to state a constitutional duty that the school defendants could have breached.

2. Policy, Custom or Practice Analysis

We read plaintiffs' amended complaints to assert a second theory of liability that is viable even in the absence of a *DeShaney* duty. In *Stoneking II*, 882 F.2d 720 (3d Cir. 1989), *cert. denied*, 110 S.Ct. 840 (1990), this court held a school district liable for deliberately and recklessly establishing and maintaining a custom, practice or policy which caused harm to a student. In *Stoneking II* a teacher sexually molested a student. We stated there that the district was liable for maintaining the policies "in deliberate indifference to actions taken by their subordinates," *id.* at 725 and emphasized that *Deshaney* was distinguishable because the abuse there "resulted at the hands of a private actor." *Id.* at 724.

We agree with the district court that this case lacks the linchpin of *Stoneking II*, namely a violation by state actors. Sexual molestation committed by an agent of the state is readily distinguishable from the situation here pressed since the due process clause itself imposes limitations on the state's conduct. Thus, section 1983 liability may not be predicated upon a *Stoneking II*-type theory where private actors committed the underlying violative acts.

C. Qualified Immunity Under Section 1983

Although we have ruled that the section 1983 claims were properly dismissed for failure to state a claim under Rule 12(b)(6), we feel compelled to note that before granting defendants' motion to dismiss, the trial court ruled that defendants Goode, Peters and Bazzel were entitled to qualified immunity.[6] This court stated in *Black v. Bayer*, 672 F.2d 309 (3d Cir. 1982) that the affirmative defense of qualified immunity could not be successfully asserted through a 12(b)(6) motion since it must be developed by affidavits at the summary judgment stage or at trial. *Id.* at 316. We think that subsequent Supreme Court rulings have so undermined the rule enunciated in that case that to the extent *Black* is to the contrary, it is no longer viable. *See*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *see e.g.*, *Hidahl v. Gilpin County DSS*, 938 F.2d 1150, 1155 (10th Cir. 1991). In view of the fact that we have concluded that plaintiffs failed to assert a constitutional claim, the district court correctly determined that these defendants were also entitled to qualified immunity. *See*, *Siegert v. Gilley*, 111 S.Ct. 1789 (1991).

D. Section 1985(3) Liability

Plaintiffs also charge that defendants engaged in a conspiracy to interfere with their civil rights in violation of 42 U.S.C. § 1985(3). In order to prevail, plaintiffs must show a conspiracy on the part of the school defendants to deprive them of

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6. It is unclear on this record whether defendants Richino and Tuttle are also entitled to the benefit of the qualified immunity defense.

equal protection or equal privileges and immunities motivated by "class-based, invidiously discriminatory customs and practices of failing to protect female students from sexual, physical and verbal abuse. Specifically, the amended complaints assert that the school defendants' acts in setting up the graphics arts classroom to include a darkroom and unisex bathroom constituted a deliberate and reckless indifference to female students' rights.

We agree with the district court that plaintiffs failed to assert any facts from which any type of conspiratorial agreement between the school defendants and the student defendants can be inferred. Neither do the pleadings establish that the alleged discriminatory policies or practices were due to plaintiffs' membership in the class of female students. "[M]ere conclusory allegations of deprivations of constitutional rights," *Robinson v. McCorkle*, 462 F.2d 111, 113 (3d Cir.), *cert. denied*, 409 U.S. 1042 (1972), are insufficient to state a section 1985(3) claim. *Id.*

In view of our affirmance of the district court's dismissal of the constitutional claims, we will also affirm the dismissal of the pendent state law claims.

The order of the district court will be affirmed.

SLOVITER, *Chief Judge, dissenting.*

Ever since the Supreme Court's opinion in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the inferior federal courts have struggled to draw the line that

will distinguish between those state-citizen relationships where the state bears no responsibility for harm resulting from private conduct and those relationships where the state's actions and the private conduct are so intermingled that the state cannot disclaim its responsibility for the harm that results. The case of children subjected to harm within the confines of a school that they are compelled to attend by state law offers perhaps the most acute of the scenarios raising this issue.[1] The majority holds that notwithstanding the state's custody over school children and its duty to act *in loco parentis* during school hours, the state bears no responsibility because the school is not the child's primary caretaker. That holding at least draws the line neatly and decisively. However, because I believe it relieves the state from accountability in this case not only for harm for which it shares responsibility but also for harm to a student to whom it owed a particularized duty, I respectfully dissent.

Focusing primarily on D.R., as the majority does, if the allegations in her complaint are true,

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1. In Stoneking v. Bradford Area School District, 856 F.2d 594 (3d Cir. 1988) (*Stoneking I*), this court found a constitutional duty owed by school officials to protect school children based on statutory and common law duties. That case was vacated and remanded by the Supreme Court for reconsideration in light of its decision in *DeShaney*. In Stoneking v. Bradford Areas School District, 882 F.2d 720 (3d Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990) (*Stoneking II*), this court did not decide whether its holding survived *DeShaney*, *Stoneking II*, 882 F.2d at 723, but nevertheless affirmed its previous decision on other grounds, stating that, in light of *DeShaney*, "we can no longer rely on the statutory and common law duties" of care to find a constitutional duty to protect school children. *Id.*

she was subject to violent, sexual assault over a five-month period while attending school. App. at 225-26. There is no question that D.R. has a liberty interest in "safety and freedom from bodily restraint." *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982). As in *DeShaney*, the question here is whether *the State* deprived D.R. of her liberty interest in "'free[dom] from . . . unjustified intrusions on personal security.'" 489 U.S. at 195 (citing *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)).

The majority believes that this case is closer to *DeShaney* than the situation where a state places a child with a foster family.[2] I cannot agree. The harm caused by the father in *DeShaney* or by a foster parent in the majority's hypothetical was not inflicted on state premises under the purview of state officials. Under the allegations here, the state school significantly contributed to the harm by requiring these minor plaintiffs to remain in a chaotic classroom situation, constructing and maintaining a unisex lavatory where they could be assaulted without observation, assigning an apparently unqualified and ineffectual student teacher as the only supervisor in an out-of-control classroom, and adopting the position of the three monkeys who see, hear and speak no evil.

Barring unusual circumstances, school attendance up until the age of seventeen is

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2. In *DeShaney*, the Court left open the possibility that the government has a constitutional duty to protect children that it places in foster care from abusive foster parents. 489 U.S. at 201, n.9. *See* Taylor ex rel. Walker v. Ledbetter, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989); Doe v. New York City Dept. of Social Services, 649 F.2d 134 (2d Cir. 1981).

mandatory in the state of Pennsylvania. Pa. Stat. Ann. tit. 24, §§ 13-1326, 1327 (Purdon's Supp. 1991); *In re D.M.*, 19 D & C.3d 514, 520 (1981).[3] During the school day, school officials exercise substantial control over students, either because they are considered to stand *in loco parentis* toward the students, Pa. Stat. Ann. tit. 24, § 13-1317 (Purdon's Supp. 1991), or, as the Supreme Court has stated, because "the concept of parental delegation has been replaced by the view - *more consonant with compulsory education laws* - that the State itself may impose . . . corporal punishment . . . 'for the maintenance of group discipline.'" *Ingraham v. Wright*, 430 U.S. 651, 662 (1977) (quoting 1 F. Harper & F. James, Law of Torts § 3.20, p.292 (1956)) (emphasis added). These rationales are frequently invoked by school officials in an attempt to claim immunity for their actions, *see New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985) (rejecting state's defense on ground that *in loco parentis* authority does not excuse school authorities from limits of Fourth Amendment), and also have been relied upon by the Court to recognize the special relationship between school officials and the students they supervise. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (recognizing "the obvious concern on the part of . . . school authorities acting *in loco parentis*, to protect children . . . from exposure to sexually explicit, indecent, or lewd speech").

The majority of secondary school students are minors and the law recognizes that their judgment

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3. D.R. was sixteen and L.H. was seventeen at the time of the incidents alleged in their complaint.

may not be fully mature and developed: children cannot vote, U.S. CONST. amend. XXVI; they cannot serve in the armed forces, 10 U.S.C. § 505(a) (1983); if arrested, they are tried in juvenile courts, 42 Pa. Cons. Stat. Ann. §§ 6301, 6322 (Purdon's Supp. 1991); and if pregnant, they must ask a parent for permission to have an abortion, 18 Pa. Cons. Stat. Ann. § 3206 (Purdon's Supp. 1991).

In their capacity as "parents," school officials can exercise control over the movements of their students. In discussing the general acceptance of corporal punishment in public schools, Justice Powell, speaking for a majority of the Court, stated that "[t]he prevalent rule in this country today privileges such force as a teacher or administrator 'reasonably believes to be necessary for [the child's] proper control, training or education.'" *Ingraham*, 430 U.S. at 661 (quoting the Restatement (Second) of Torts § 147 (2) (1965)). The obvious corollary to this control is the principle that the school child is not free do anything or go anywhere she pleases while at school.

In this case, for example, D.R. claims that in order to avoid the situation in the classroom lavatory, she repeatedly requested a pass to use a different lavatory. Peters, the student teacher in charge of D.R.'s class, either ignored her or refused. App. at 228. As a result, D.R. was obliged by the actions of the school itself to use the unisex lavatory.

In *DeShaney*, the Supreme Court emphasized that Joshua DeShaney suffered all of his injuries at the hands of and while in the custody of his father. 489 U.S. at 201. The Court stated that

although the State itself may not deprive people of their liberty, the Due Process Clause does not "impose an affirmative obligation on the State to ensure that those interests do not come to harm *through other means*." *Id.* at 195 (emphasis added). Quoting its opinion in *Harris v. McRae*, 448 U.S. 297, 317-18 (1980), the Court noted that the Due Process Clause "'does not confer an entitlement to such [government aid] as may be necessary to realize all the advantages of that freedom.'" *DeShaney*, 489 U.S. at 196. It added that "a State's failure to protect an individual against *private violence* simply does not constitute a violation of the Due Process Clause." *Id.* at 197 (emphasis added). Finally, the Court noted that "while the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201.[4]

This is nothing like the situation of D.R. In this case, the injury to D.R. did not come about through "other means," allowing the state to claim, as it did in *DeShaney*, that it did not play some role in creating the danger to the plaintiff or making her "more vulnerable." The most extreme sexual misconduct allegedly went on in a unisex

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4. This court has had a number of opportunities to interpret this standard. In Philadelphia Police & Fire Association v. City of Philadelphia, 874 F.2d 156, 168 (3d Cir. 1989), the court held that *DeShaney* "makes clear that a 'state's affirmative act of restraining the individual's freedom to act on his own behalf - through incarceration, institutionalization, *or other similar restraint on personal liberty*' is a prerequisite to the state's obligation to provide care." (quoting *DeShaney*, 489 U.S. at 200) (emphasis added).

lavatory, designated as such by school officials, with an inside lock. Appellants allege that the teacher of that classroom witnessed daily the chaotic behavior that took place in her classroom and was present when the male students grabbed at D.R., touched her breasts, pushed her down, and dragged her into the bathroom. App. at 222, 226-28. The teacher's general reaction was to ignore the behavior or walk away. App. at 229. The other school officials also knew and did not try to remedy the situation. App. at 230-232. On one occasion Peters even made the students open the bathroom door when she knew a number of boys and girls were in there. App. at 228. Apparently a videotape of the class was made by a male student which showed "open lewdness" while the teacher was sitting at her desk watching. App. at 222-23, 739-41.

I do not see how we can say that in this situation the harm to D.R. came about by means apart from the state and that the state had no role in creating the dangers to plaintiff. This is not "private violence": some of it was carried out right in front of the teacher and the behavior in the lavatory, although outside of the teacher's immediate sight, was most likely well within her knowledge.

Despite the majority's reference to *Philadelphia Police*, 874 F.2d 156, this is not a case of a plaintiff claiming entitlement to government aid which has been withdrawn and which the government has no duty to provide in the first place, nor is it a case where the court needs to draw fine lines between the need for disciplinary measures in the school setting and the constitutional prohibition of cruel and unusual

punishment. *See Ingraham*, 430 U.S. 651. Rather, this is a claim that if the government is going to require that minor children spend most of their waking hours subject to its control and disciplinary rules, *id.*, the government owes some duty to those children that their most profound liberty interest, the interest in personal security and dignity, is not brutally violated by means that were completely within the power of the state to prevent.

The foregoing analysis is, at least on the face of the complaints, applicable to both D.R. and L.H. However, it is apparent from the record of the juvenile hearing before the state judge at which the perpetrators were found to be delinquent that D.R. qualified as an "exceptional child," *see* Majority Typescript Op. at 4 n.3, because she is "almost totally hearing impaired" and "her powers of articulation are seriously limited." App. at 744.[5] The majority leaves open the door for claims of elementary school age children, Majority Typescript Op. at 15 n.5, presumably because those children have immature judgment and may not be sufficiently independent of the school authorities to complain to their parents about constitutional deprivation occurring at school. D.R., notwithstanding her age, was apparently in a similar situation.

The record before us shows that D.R. also was unwilling to disobey her teacher and, in a poignant revelation of her own vulnerability, stated that she was afraid that if she complained about the

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5. The transcript of the state proceeding was attached to defendants' motion to dismiss. It is, in any event, a matter of public record.

brutality to anyone and was removed from the classroom, she would have nowhere to go. App. at 232, 746. The fact is that she suffered these indignities for many months before telling anyone. Presumably her fear arose from the fact that she had already been removed from a regular public school to go to this vocational school. There is little question, if we take the allegations of the complaint to be true, that Ms. Peters and other school officials knew about D.R.'s disability and about at least some of the offenses to which she was being subjected. App. at 229.

I believe that under these circumstances *DeShaney* is distinguishable. Unless and until the Supreme Court takes *DeShaney* a step beyond its already extensive applicability, I believe that there is still room to apply the protections provided by section 1983 to the fact pattern alleged in these complaints. Because I do not agree with the majority's limited view of the viability of the constitutional claims asserted here, I also disagree with its disposition of the qualified immunity defenses proffered by the individual defendants.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Filed August 11, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 91-1136 and 91-1137

D.R., a minor child, by her parent
and natural guardian, L.R., and L.R.,
individually and in her own right,

Appellants, No. 91-1136

v.

MIDDLE BUCKS AREA VOCATIONAL TECHNICAL SCHOOL; WILLIAM GOODE; JAMES C. BAZZEL; MARTHA RICHINO; SUSAN PETERS; BUCKS COUNTY INTERMEDIATE UNIT NO. 22; CHRISTINA TUTTLE; PENN RIDGE SCHOOL DISTRICT; CHARLES FAMBRO; FRED FREEMAN; JAMES A. GALLAGHER; BRIAN MILLER; MARC R. RATCLIFFE; JAMES M. SPERLING; LESTER SUTPHIN

and

L.H., BUCKS COUNTY, PENNSYLVANIA,

Appellant, No. 91-1137

v.

MIDDLE BUCKS AREA VOCATIONAL TECHNICAL SCHOOL; AND WILLIAM GOODE AND JAMES C. BAZZEL AND MARTHA RICHINO AND SUSAN PETERS AND JAMES A. GALLAGHER AND BRIAN MILLER AND MARC R. RATCLIFFE AND JAMES M. SPERLING AND LESTER SUTPHIN

Appeals from the United States District Court
for the Eastern District of Pennsylvania

D.C. Civil Nos. 90-03018 and 90-03060

Argued July 16, 1991

Before: SLOVITER, *Chief Judge*,
GREENBERG and SEITZ, *Circuit Judges*.

Reargued In Banc May 6, 1992

Before: SLOVITER, *Chief Judge*, BECKER,
STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD,
ALITO, ROTH and SEITZ, *Circuit Judges*.

Filed: August 11, 1992

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OPINION OF THE COURT

SEITZ, *Circuit Judge*.

This appeal presents us with a classic case of constitutional line drawing in a most excruciating factual context.

Plaintiffs, D.R., a minor child, by her parent, L.R. and L.H., both public high school students, as well as L.R. in her own right,[1] appeal the decision and order of the district court dismissing

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1. Because of our disposition of this appeal, we need not decide whether L.R., the parent of plaintiff D.R., has a legally cognizable constitutional claim in her individual right.

their amended complaints against Middle Bucks Area Vocational Technical School ("Middle Bucks"), Penn Ridge School District ("Penn Ridge"), Bucks County Intermediate Unit No. 22 ("Unit No. 22"), and individually named teachers and officials[2] ("school defendants"). Claims were also asserted against seven male students. Only two students, James Gallagher and Marc Ratcliffe, appeared, but because all seven were allegedly involved in the wrongful conduct we shall include all of them in referring to "student defendants."[3] Future references to "plaintiffs" will apply to D.R., by her parent, and L.H. unless otherwise noted.

The amended complaints pleaded claims under 42 U.S.C. §§ 1983 and 1985(3) (1988), as well as state law claims. Federal jurisdiction was invoked under 28 U.S.C. §§ 1341 and 1343 (1988),[4] and pendent jurisdiction over the state law claims. This court has jurisdiction pursuant to 28 U.S.C. § 1291 (1988).

I. AMENDED COMPLAINTS

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2. These individuals are William Goode and James Bazzell, both building administrators, the classroom student teacher, Susan Peters, and guidance counselors Martha Richino and Christina Tuttle.

3. There is no record evidence to demonstrate that students Fambro, Freeman, Miller, Sperling and Sutphin were served with process or entered an appearance. Persons who are not served and do not appear are not parties to an action and thus do not prevent the judgment from becoming final. *DeTore v. Local Number 245*, 615 F.2d 980, 982, n.2 (3d Cir. 1980).

4. Plaintiffs also asserted §§ 1986 and 1988 claims, but they are not pressed on appeal.

Plaintiffs were two female students in a graphic arts class at Middle Bucks.[5] They allege that while attending the arts class during the 1989-90 school year, several male students in the same class physically, verbally and sexually molested them. This conduct took place primarily in the unisex bathroom and a darkroom, both of which were part of the graphic arts classroom.

Plaintiff, D.R., avers that the student defendants grabbed her and either forced or carried her into the bathroom or darkroom on a regular basis and physically abused her. She asserts that such conduct took place on an average of two to four times per week from January to May of 1990. Plaintiff, L.H., claims that some of the student defendants molested her two to three times per week from December 1989 to May of 1990. Plaintiffs allege that the sexual molestation consisted of offensive touching of their breasts and genitalia, sodomization and forced acts of fellatio. The student defendants also allegedly forced plaintiffs to watch similar acts performed on other students.

Defendant Susan Peters was the student teacher in the graphic arts classroom during the time of the alleged conduct in question. Plaintiffs do not claim to have informed Peters of the molestation but assert that Peters was or should have been in

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5. Plaintiff, D.R., attended graphics occupation classes at Middle Bucks pursuant to an arrangement between Penn Ridge and Unit No. 22. The districts arranged her placement due to her status as an "exceptional" student under Pennsylvania law. Pa.Stat.Ann. tit. 24 § 13-1371 (1962 & Supp. 1991). She was accorded exceptional student status because of her hearing impairment and related communication problems.

the classroom during the time of the acts complained of and either heard or should have heard the incidents taking place. Peters admittedly experienced difficulty in controlling the class generally. She allegedly was exposed to a variety of misconduct by the student defendants including obscene language and gestures, and physically, but not sexually, offensive touching of females including herself in the main classroom.

Plaintiff, L.H., avers that in December of 1988, she told defendant Bazzel, Assistant Director of Middle Bucks, that one student defendant was trying to force her into the bathroom for the purpose of engaging in sexual conduct. She alleges that Bazzel did not take action to correct the situation. Plaintiffs also allege that other individual school defendants had knowledge of the severe non-sexual misconduct occurring in the classroom.

Based on the foregoing allegations, the amended complaints assert violations of plaintiffs' civil rights by the school and student defendants under 42 U.S.C. §§ 1983 and 1985(3) as well as Pennsylvania law.

II. DISTRICT COURT RULING

On the basis of the record before it, the district court found that defendants Goode, Peters, and Bazzel were entitled to qualified immunity under § 1983. *D.R., L.R. and L.H. v. Middle Bucks Area Vocational Technical School*, No. 90-03018 and 90-03060, 1991 U.S.Dist. LEXIS 1292 at *17-18 (E.D.Pa. Feb. 1, 1991). Rather than dismissing on that basis as to those defendants, however, the district court granted defendants' motions[6] to

6. School defendants Middle Bucks, Penn Ridge, Goode,

dismiss both complaints under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim.

The district court first held that a special custodial relationship between plaintiffs and the school defendants was established by virtue of the state's compulsory attendance and truancy laws, Pa.Stat.Ann. tit. 24 §§ 13-1326-13-1330, 13-1333 and 13-1343 (1962 & Supp. 1991), thus creating an affirmative constitutional duty on the part of the school defendants to protect plaintiffs from the types of acts committed by the student defendants. *D.R., L.R. and L.H.*, 1991 U.S. Dist. LEXIS 1292 at *27. The court found that the existence of the affirmative duty to act was complemented by Pennsylvania law which gives school officials *in loco parentis* standing to take any action necessary to prevent disciplinary infractions and educationally disruptive behavior. Pa.Stat.Ann. tit. 24 § 13-1317 (1962 & Supp. 1991). Nevertheless, the court concluded that the amended complaints failed to allege sufficient knowledge of the student misconduct on the part of the school defendants to charge them with the requisite reckless indifference to plaintiffs' rights to support a § 1983 claim and, therefore, dismissed the complaints.

III. DISCUSSION

Bazzel, Peters, Richino, along with student defendants Gallagher and Ratcliffe filed Rule 12(b)(6) motions to dismiss the amended complaints which were granted by the district court's order. The parties stipulated that school defendants Unit No. 22 and Tuttle would be deemed to have filed timely 12(b)(6) motions as well. The court then dismissed Unit No. 22 and Tuttle on that basis.

Plaintiffs' amended complaints allege that the school defendants had knowledge of the physical, verbal and sexual abuse committed by the student defendants and maintained a policy of laxity toward such conduct. They assert that the district court impermissibly narrowed their allegations by focusing solely on the issue of the school defendants' awareness of the sexual misconduct. Thus, as a consequence, they argue that the district court erred in granting the Rule 12(b)(6) motions, given the more expansive allegations and theories presented in their amended complaints.

The school defendants respond that the district court's dismissal can be affirmed by this court without reaching the issue of the sufficiency of the factual allegations as to their knowledge of the conduct of the student defendants. They assert that, contrary to the district court's ruling, no special relationship of constitutional proportions existed between plaintiffs and the school defendants. Thus, they say that this § 1983 action is not maintainable. We turn to that important and complex issue in this most wrenching factual setting.

A. Standard of Review

This court's scope of review of the district court's dismissal for failure to state a claim is plenary. *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990). We are required to "accept as true the facts alleged in the amended complaints and all reasonable inferences that can be drawn therefrom." *Id.* Construing the pleadings in favor of plaintiffs then, we must "determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." *Colburn v. Upper*

Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989).

B. Legal Sufficiency of the Complaints under § 1983

Generally, the first issue in a § 1983 case is whether a plaintiff sufficiently alleges a deprivation of any right secured by the constitution. *Baker v. McCollan*, 443 U.S. 137, 140 (1978). When a defendant asserts the affirmative defense of qualified immunity, however, the court must determine as a threshold matter whether the defendant is entitled to that defense. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, we must begin by addressing the immunity defense[7] asserted by defendants Goode, Peters and Bazzel.[8]

Officials exercising discretionary powers are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* The Supreme Court in *Siegert v. Gilley*, 111 S.Ct. 1789 (1991), recently clarified the analytical framework

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7. This court stated in *Black v. Bayer*, 672 F.2d 309 (3d Cir. 1982), that the affirmative defense of qualified immunity could not be successfully asserted through a 12(b)(6) motion since it must be developed by affidavits at the summary judgment stage or at trial. *Id.* at 316. We think that subsequent Supreme Court rulings have so undermined the rule enunciated in that case, that it is no longer viable. *See, Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *see e.g., Hidahl v. Gilpin County DSS*, 938 F.2d 1150, 1155 (10th Cir. 1991).

8. It is unclear on this record whether defendants Richino and Tuttle are also entitled to the benefit of the qualified immunity defense but it is moot in view of our decision.

to be used to evaluate whether a plaintiff's allegations overcome the defense of qualified immunity. The Court there said that, "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is *the determination of whether the plaintiff has asserted a violation of a constitutional right at all.*" *Id.* at 1793 (emphasis added). Thus, the predicate question for Goode, Peters and Bazzel is the same as that posed with respect to the other school defendants, namely, whether plaintiffs allege the "deprivation of any right secured by the constitution." *Baker*, 443 U.S. at 140. We will, therefore, consider plaintiffs' allegations of constitutional error as they relate to all of the school defendants.[9]

Plaintiffs state that they have a liberty interest in their personal bodily integrity protected by the Fourteenth Amendment as recognized in *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977), and *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982). Defendants do not argue otherwise. In order to demonstrate a violation of their constitutional rights plaintiffs' amended complaints essentially

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9. The district court did not specify which 12(b)(6) motions of the defendants it granted. Thus, it appears that its order applied to all motions to dismiss for failure to state a claim, including those of student defendants Gallagher and Ratcliffe. It is clear that § 1983 actions may only be maintained against persons acting under color of state law. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled in part on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). There is no such allegation as to students Gallagher and Ratcliffe. Thus, it is clear that the complaints failed to state a federal claim against them.

assert four theories of liability. The first is based upon the finding of the existence of a special relationship between plaintiffs and the school defendants during the school day. Such relationship, they assert, gave rise to an affirmative constitutional duty on the part of state officials to protect students such as these plaintiffs from serious harm. Second, plaintiffs contend that the school defendants are liable for creating a danger that resulted in a violation of plaintiffs' constitutional rights under the Fourteenth Amendment. Third, they assert that the school defendants are responsible for the existence of a policy, custom or practice that permitted injuries to the plaintiffs in violation of their constitutional rights. Fourth, plaintiffs assert that defendants conspired to deprive them of certain constitutional rights. We will deal with each theory in turn.

IV. CONSTITUTIONAL CLAIMS

A. Special Relationship Custody

We commence our analysis by reiterating the well-established principle that the Due Process Clause does not impose an affirmative duty upon the state to protect its citizens. Rather, it serves as a limitation on the state's power to act. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 195 (1989); *Flalkowski v. Greenwich Home for Children, Inc.*, 921 F.2d 459, 465 (3d Cir. 1990). However, when the state enters into a special relationship with a particular citizen, it may be held liable for failing to protect him or her from the private actions of third parties. *Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d 348, 352 (11th Cir. 1990). This liability attaches

under § 1983 when the state fails, under sufficiently culpable circumstances, to protect the health and safety of the citizen to whom it owes an affirmative duty. *See Cornelius*, 880 F.2d at 353.

We must decide at the outset whether the school defendants had such a special relationship with the plaintiffs during school hours that they owed plaintiffs a constitutional duty to protect them from the misconduct of the student defendants. Plaintiffs argue that one way the state can enter into a duty-producing relationship under this theory is by restraining a citizen's freedom to act on his or her own behalf. In addressing this argument, we turn to one of the seminal Supreme Court cases shedding light on § 1983 liability in this area.

In *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), the Court declined to impose a constitutional duty upon a state to protect the life, liberty or property of a citizen from deprivations by private actors absent the existence of a special relationship. *DeShaney* involved the state's repeated receipt of reports of abuse of a minor by his father. Notwithstanding the notice provided by the reports to the state agency, it did not remove the child from his father's custody.[10] The father subsequently beat the child resulting in permanent brain damage. The child and his mother filed a § 1983 action against state officials

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10. At one point, a court order placed Joshua in the temporary custody of the hospital where he was receiving treatment. A team of specialists determined, however, that there was insufficient evidence of child abuse for the state to retain custody over Joshua.

claiming that they deprived the minor of his liberty in violation of the Fourteenth Amendment "by failing to protect him against a risk of violence at his father's hands of which they knew or should have known." *DeShaney*, 489 U.S. at 193.

After stating the general rule that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause," *Id.* at 197, the Court went on to acknowledge that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *DeShaney*, 489 U.S. at 198. The Court noted that it first recognized such an exception in *Estelle v. Gamble*, 429 U.S. 97 (1976). The Court in *Estelle* held that the state had an affirmative duty to provide adequate medical care for prisoners since incarceration prevents an inmate from caring for himself. *Id.* at 103-04.

The Court extended the *Estelle* exception from the Eighth Amendment context to a Fourteenth Amendment substantive due process claim in *Youngberg v. Romeo*, 457 U.S. 307 (1982). According to the *DeShaney* court, it there held that the Constitution imposed a duty upon the state to provide involuntarily committed mental patients "such services as are necessary to ensure their 'reasonable safety' from themselves and others." *DeShaney*, 489 U.S. at 199. The Court also pointed out in *DeShaney*, without editorial comment, that several appellate courts had analogized foster children to individuals who fall within the *Estelle* and *Youngberg* exceptions. *Id.* at 201 n.9. These courts imposed liability on the state for failing to protect children that the state placed in the care

of foster parents when such placement resulted in abuse.

In commenting on each situation constituting a departure from the general rule, the Court noted:

> [I]t is the State's *affirmative act of restraining the individual's freedom to act on his own behalf* through incarceration, institutionalization, or other similar restraint of personal liberty- which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

DeShaney, 489 U.S. at 200 (emphasis added). Focusing primarily on physical restraint, the Court concluded that the *Estelle-Youngberg* exception was inapplicable to Joshua DeShaney's case since the conduct did not occur while the child was in the state's custody.

Although the Court decided that Joshua's situation did not amount to state custody, it left open the possibility that the duty owed by a state to prisoners and the institutionalized might also be owed to other categories of persons in custody by means of "similar restraints of personal liberty." *Id.* at 200. Plaintiffs seek to bring themselves within the quoted language.

Plaintiffs assert that Pennsylvania's scheme of compulsory attendance and the school defendants' exercise of *in loco parentis* authority over their pupils so restrain school children's liberty that plaintiffs can be considered to have been in state "custody" during school hours for Fourteenth Amendment purposes. We consider this to be an open question in this circuit. *See Stonekting v.*

Bradford Area School District, 882 F.2d 720, 724 (3d Cir. 1989).

Pennsylvania law mandates that every child of "compulsory school age" attend a day school. Pa.Stat.Ann. tit. 24 § 13-1327. Both children and their parents may be penalized for the child's truancy. Pa.Stat.Ann. tit. 24 § 13-1333 and 1343. However, a child is only of compulsory school age "*until* the age of seventeen (17) years." Pa.Stat.Ann. tit. 24 § 13-1326 (emphasis added). At the time of the incidents alleged, D.R. was sixteen and L.H. was seventeen years old. Appendix at 336. Thus, Pennsylvania law only mandated D.R.'s attendance. To the extent that plaintiffs' argument is dependant upon the compulsion provided by section 13-1327, it is, therefore, only applicable to D.R.

In order to decide whether a special relationship of constitutional proportions exists between the school defendants and D.R. by virtue of the Pennsylvania statutes, we must consider the *DeShaney* Court's rationale for the *Estelle-Youngberg* exception. The Court explained its reasoning as follows:

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs - *e.g.* food, clothing, shelter, medical care, and reasonable safety - it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

DeShaney, 489 U.S. at 200. Thus, the question presented to us is whether compulsory attendance

paired with the *in loco parentis* authority of the school defendants resulted in such an affirmative restraint of D.R.'s liberty by the state that she was left without reasonable means of self-protection and, indeed, whether the focus should be confined to the school day.

Our court has read *DeShaney* primarily as setting out a test of physical custody. *Philadelphia Police & Fire Ass'n for Handicapped Children, Inc. v. City of Philadelphia*, 874 F.2d 156, 167 (3d Cir. 1989) ("the state continues to owe an affirmative duty to protect those physically in its custody"). *See also, Fialkowski v. Greenwich Home for Children, Inc.*, 921 F.2d 459 (3d Cir. 1990) (deciding no *Youngberg* duty of care exists for mentally retarded adult voluntarily placed at institution because state has not substantially curtailed his freedom). The issue in *Philadelphia Police* was whether the state could be held liable for withdrawing vocational and support services provided in a daily program for mentally handicapped children. While admitting that cessation of services would be detrimental to the children, this court refused to expand the *Estelle-Youngberg* custody exception to these children since it was "impossible to find an affirmative duty to protect the mentally retarded living at home." *Id.* at 168. In essence, the court did not "believe that such intermittent custody gives rise to an affirmative duty on the state's part." *Id.* at 168 n.9.

D.R. argues that, unlike the plaintiffs in *Philadelphia Police* who chose to receive state services, or plaintiff's decedent in *Fialkowski* who was voluntarily placed at the state institution, she

was legally compelled to attend school and was placed under the control of state actors who were given parental authority over her as a matter of law. She therefore contends that she was in the state's custody during school hours within the rationale of the *Estelle-Youngberg* exception. She relies on the Supreme Court's explanation that *Estelle* and *Youngberg* together stand "for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney*, 489 U.S. at 199-200.

The *Estelle-Youngberg* type custody referred to by the Court in *DeShaney*, however, is to be sharply contrasted with D.R's situation. The state's duty to prisoners and involuntarily committed patients exists because of the full time severe and continuous state restriction of liberty in both environments. Institutionalized persons are wholly dependant upon the state for food, shelter, clothing and safety. It is not within their power to provide for themselves, nor are they given the opportunity to seek outside help to meet their basic needs. Obviously, they are not free to leave.

Here it is the parents who decide whether that education will take place in the home, in public or private schools or, as here, in a vocational-technical school. *Id.* For some, the options may be limited for financial reasons. However, even when enrolled in public school parents retain the discretion to remove the child from classes as they see fit, *see* Pa.Stat.Ann. tit. 24 § 15-1546 (1962 & Supp. 1991) (religious instruction); 22 Pa.Code § 11.26 (1992)

(non-school sponsored educational trips and tours); Pa.Stat.Ann. tit. 24 § 13-1329 (1962) (healthcare), subject only to truancy penalties for continued periods of unexcused absence. Pa.Stat.Ann. tit. 24 §§ 13-1333 and 13-1343. In the case of special education students, the parents have even greater involvement since they must approve the precise educational program developed for their child. 20 U.S.C. § 1415 (1988); 22 Pa.Code §§ 14.32, 14.61-68 (1992). Moreover, as the Pennsylvania Supreme Court has recognized, even without reference to the Pennsylvania School Code or related statutes, "it [cannot] be denied that a parent is justified in withdrawing his child from a school where the health and welfare of the child is threatened." *Zebra v. School District of City of Pittsburgh*, 296 A.2d 748 (Pa. 1972).

Our view that parents remain the primary caretakers, despite their presence in school, is not affected by section 13-1317 which grants Pennsylvania teachers and principals *in loco parentis* status. Section 13-1317 operates in conjunction with section 5-510. Together they permit school boards to set reasonable regulations to govern students' conduct. Pa.Stat.Ann. tit. 24 § 5-510 (1962 & Supp. 1991). However, section 13-1317 invests in school officials "only such control as is reasonably necessary to prevent infractions of discipline and interference with the educational process." *Axtell v. Lepenna*, 323 F.Supp. 1077 (W.D.Pa. 1971). As the Commonwealth court concluded, section 13-1317 "invests *authority* in public school teachers; it does not impose a *duty* upon them." *Pennsylvania State Education Association v. Department of Public Welfare*, 449 A.2d 89, 92 (Pa.Commw.Ct. 1982)

(emphasis in original) (holding that teachers are not among those persons "responsible" for a child's welfare under § 2203 of the Child Protective Services Law, Pa.Stat.Ann. tit. 11 §§ 2201-2224 (1962), now codified at 23 P.C.S.A. § 6311 (1991)).

By requiring D.R. to attend assigned classes at Middle Bucks as part of her high school educational program, and authorizing officials to engage in disciplinary control over the students, the school defendants did not restrict D.R.'s freedom to the extent that she was prevented from meeting her basic needs. *See Fialkowski*, 921 F.2d at 456-66 (mentally retarded adult's liberty not restrained by state where "the Fialkowskis were free to remove their son from [the state institution] if they wished [and] Walter Fialkowski himself enjoyed considerable freedom of movement.") Thus, the school defendants' authority over D.R. during the school day cannot be said to create the type of physical custody necessary to bring it within the special relationship noted in *DeShaney*, particularly when their channels for outside communication were not totally closed.

The analogy between school children and prisoners or the involuntarily committed is weakened further by the fact that school children remain resident in their homes. Thus, they may turn to persons unrelated to the state for help on a daily basis. D.R's complaint alleges an ongoing series of assaults and abuse over a period of months. Although these acts allegedly took place during the school day, D.R. could, and did, leave the school building every day. The state did nothing to restrict her liberty after school hours and thus did not deny her meaningful access to sources of help.

As noted previously, some courts have imposed a constitutional duty to protect foster children by analogy to involuntarily institutionalized individuals. *See, Doe v. New York City Dept. of Social Services*, 649 F.2d 134 (2d Cir. 1981), after remand, 709 F.2d 782, *cert. denied sub nom, Catholic Home Bureau v. Doe*, 464 U.S. 864 (1983); *Taylor by and through Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1991). We, of course, are not called upon to decide the foster care issue. Nevertheless, we do note that although the situation of a public school student is perhaps closer to that of a foster child than to an institutionalized person, the foster care analogy is not decisive.

A relationship between the state and foster children arises out of the state's affirmative act in finding the children and placing them with state-approved families. *Taylor*, 818 F.2d at 794-97. By so doing, the state assumes an important continuing, if not immediate, responsibility for the child's well-being. In addition, the child's placement renders him or her dependent upon the state, through the foster family, to meet the child's basic needs. *Id.* Students, on the other hand, do not depend upon the schools to provide for their basic human needs. Public school students are required to spend only 180 six-hour days in the classroom per year. Pa.Stat.Ann., tit. 24 §§ 13-1327(b), 15-1501, 15-1504(a) (1962 & Supp. 1991). Even during the school day, however, parents or others remain a child's primary caretakers and decisionmakers. *See e.g.*, Pa.Stat.Ann., tit. 24 § 14-1406 (1962) (parents responsible for necessary medical treatment). Pennsylvania's compulsory attendance

law demands only that parents ensure that their child receive an appropriate education. Pa.Stat.Ann. tit. 24 § 13-1327. Thus, the relationship between foster children and public school students is not controlling here.

Our view of the public school function with respect to its students seems to be in harmony with the Supreme Court's description of that institution in the context of denying school children Eighth Amendment protection from corporal punishment. There the Court said:

> The school child has little need for the protection of the Eighth Amendment. Though attendance may not always be voluntary, the public school remains an open institution. Except perhaps when very young, the child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.

Ingraham, 430 U.S. at 670.

Our position that no special relationship based upon a restraint of liberty exists here is in accord with the only other appellate case to directly confront this issue to date. In *J.O. v. Alton Community Unit School Dist. 11*, 909 F.2d 267 (7th Cir. 1990), the Court of Appeals for the Seventh Circuit found that compulsory attendance laws did not liken school children to prisoners and the involuntarily committed, both of whom are unable to provide for their own basic human needs. Instead, the Seventh Circuit determined that

parents have primary responsibility to provide for the basic needs of their children and that both school children and parents "retain substantial freedom to act." *Id.* at 272.

B. State Created Danger

We come to plaintiffs' second basis for their constitutional claim, viz., that the school defendants created the danger that eventuated in a violation of plaintiffs' constitutional rights. Plaintiffs' counsel asserts that this claim exists apart from the claim based on the compulsory attendance law and applies to both plaintiffs. We now address that claim.

We understand plaintiffs' amended complaints, their briefs and the oral assertions of their counsel to advance a claim that the school defendants imperiled plaintiffs, or increased their risks of harm, by: (1) failing to report to the parents or other authorities the misconduct resulting in abuse to plaintiffs; (2) placing the class under the control of an inadequately trained and supervised student teacher; (3) failing to demand proper conduct of the student defendants; and (4) failing to investigate and put a stop to the physical and sexual misconduct. Plaintiffs say that these acts or omissions "created a climate which facilitated sexual and physical abuse of students." L.H.'s Amended Complaint, App. at 58. Thus, they assert that having placed plaintiffs in the situation alleged, the school defendants were obligated to protect them from violations of their personal bodily integrity by other students who were also under such defendants' control.

The state-created danger theory, utilized to find a constitutional tort duty under § 1983 outside of

a strictly custodial context, has been recognized by several courts of appeals.[11] *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 341 (1990); *Jackson v. City of Joliet*, 715 F.2d 1200, 1204 (7th Cir. 1983). After determining in *DeShaney* that there was no *Estelle-Youngberg* type custody there giving rise to an affirmative duty of protection, the Court commented that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, *it played no part in their creation, nor did it do anything to render him more vulnerable to them*." *DeShaney*, 489 U.S. at 201 (emphasis added).

Post-*DeShaney* courts have tracked the quoted Supreme Court's language by asking whether the state actors involved affirmatively acted to *create* plaintiff's danger, or to render him or her more *vulnerable* to it. *See e.g., Bryson v. City of Edmond*, 905 F.2d 1386, 1392 (10th Cir. 1990) (declining to impose liability upon state for deaths of post office employees shot by fellow worker where responding police did not create the dangerous situation nor act to worsen decedents' plights). We turn to Third Circuit case law in this area.

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11. Justice Brennan, dissenting in *DeShaney*, noted that, "[c]ases from the lower courts also recognize that a State's actions can be decisive in assessing the constitutional significance of subsequent inaction. For these purposes, moreover, actual physical restraint is not the only state action that has been considered relevant." *DeShaney*, 489 U.S. at 205 (Brennan, J., dissenting) (citing *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979)).

In *Brown v. Grabowski*, 922 F.2d 1097 (3d Cir. 1990), this court considered the state-created danger theory as enunciated in *Wood* and *Cornelius*. There, the plaintiff's decedent reported to the police that her former boyfriend had held her hostage, threatened her, and sexually assaulted her for three days. The police did not place her abductor under arrest, and failed to inform her of her right to request a temporary restraining order under New Jersey's Prevention of Domestic Violence Act. N.J.Stat.Ann. § 2C:25-7 (1982). She was subsequently found dead in the trunk of her abductor's car. This court distinguished the state officials' actions in *Brown* from those in *Wood* and *Cornelius* where the courts found affirmative constitutional duties of protection. *Brown*, 922 F.2d at 1114-17. Ultimately, the court concluded that, "[i]n contrast to the plaintiff in *Wood*, [plaintiff] has supplied no evidence that [the state actors] acted to create or to exacerbate the danger that [the abductor] posed to [her], thereby triggering a possible constitutional duty to assist her in gaining access to the civil courts." *Id.* at 1116.

Plaintiffs here also rely upon *Wood* and *Cornelius* to demonstrate the use of the state-created danger theory to impose liability under § 1983. In addition, they cite *Swader v. Virginia*, 743 F.Supp. 434 (E.D.Va. 1990), *Horton v. Flenory*, 889 F.2d 454 (3d Cir. 1989), and *Germany v. Vance*, 868 F.2d 9 (1st Cir. 1989). As in *Brown*, however, the facts alleged in plaintiffs' amended complaints differ in important respects from those in the state-created danger line of cases.

Liability under the state-created danger theory is predicated upon the states' affirmative acts which work to plaintiffs' detriments in terms of exposure to danger. As the Court of Appeals for the First Circuit commented:

> We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

Bowers v. Vito, 686 F.2d 616, 618 (1st Cir. 1982). Although we find this to be an extremely close case, and certainly a tragedy, we are convinced that the school defendants did not create plaintiffs' peril, increase their risks of harm, or act to render them more vulnerable to the student defendants' assaults.

In *Wood*, the police officer arrested an intoxicated driver and impounded the vehicle leaving the driver's female passenger in a neighborhood known for criminal activity at night without any means to travel to a place of safety. The woman was raped by a stranger who offered to take her home. In *Cornelius*, the state prison officials and local officers instituted a prisoner work program which permitted inmates to work in public areas with access to dangerous weapons under the general supervision of an untrained city employee. Although the authorities represented to the public that only property offenders would be assigned to the work crews, the state permitted a

prisoner with a violent criminal history to work in the town hall where plaintiff was employed. This prisoner abducted plaintiff at knife-point and held her hostage for three days, subjecting her to repeated threats of physical and sexual abuse. Finally, in *Swader*, officials permitted a prisoner serving a life sentence for rape to work unsupervised outside the prison gates, but still on prison property. This prisoner raped and killed the daughter of a prison employee who was required by her employment to reside on the complex grounds.

In each of these cited cases, the state can fairly be said to have affirmatively acted to create the danger to the victims. The school defendants' "acts" in assigning student teacher Peters to the graphic acts class and failing to supervise her more closely, as well as their failure to put a stop to the non-sexual pandemonium may have created a recognizable risk that plaintiffs would receive little education in that class, and perhaps, physical injury due to the roughhousing. Plaintiffs did not suffer harm, however, from that kind of foreseeable risk. *See Williamson v. City of Virginia Beach, Va.*, 786 F.Supp. 1238, 1253 (E.D.Va. 1992) (no § 1983 liability for minor informant's suicide due to stress of receiving threats where recognized risk is retaliation against the informant or his family). Plaintiffs' harm came about solely through the acts of private persons without the level of intermingling of state conduct with private violence that supported liability in *Wood*, *Swader* and *Cornelius*.

We now turn to the final two cases cited by plaintiffs to support their theory of state-created danger. In *Horton*, the owner of a private club, a

retired police officer known for his violence, believed an employee to be responsible for the burglarization of the club. He interrogated the employee and summoned the police. Sergeant Dlubak, who responded to the call, also questioned the employee, but refused to remove him from the owner's premises notwithstanding signs of physical mistreatment. This court imposed liability upon the state holding that "[c]learly, Sgt. Dlubak was a participant in the custody which led to the victim's death." *Id.* at 458.

In *Germany*, plaintiff, a minor, was committed to the custody of the state based upon a charge of assault and battery upon her father. The court held the state liable under § 1983 for its failure to reveal an admission obtained after the delinquency proceedings that plaintiff's parents had fabricated the assault charge to obtain state services for their daughter. The state's failure to disclose the information resulted in continued state "custody" via foster homes and other placements, after the grounds for the delinquency charges had dissipated.

We believe that plaintiffs' reliance on *Horton* and *Germany* to support their theory of state-created danger is misplaced since we read both cases to turn upon a finding of "functional" custody. Moreover, the school defendants here, unlike the state officials in *Horton* and *Germany*, are not alleged to have encouraged or implicitly authorized the violations by bestowing on the student defendants any authority under color of law. In both cited cases, the states' acts in withholding vital information served to increase the risks of harm by permitting continued custody with the states' imprimatur.

Plaintiffs also allege that the "acts of the School Defendants ... in setting up the graphic arts classroom, and the unisex bathroom, demonstrates a *custom, policy or practice* of ... indifference to and the failure to protect [plaintiffs'] rights." L.H.'s Amended Complaint, App. at 263 (emphasis added). The allegation seems to be made to support a contention that the state created or increased plaintiffs' danger.

We do not believe, however, that the state can be said to have created or increased plaintiffs' risk of danger by constructing and maintaining the graphic arts classroom with its particular physical layout. Bathrooms generally are equipped with inside locks for privacy purposes and obviously, the room was not intended to be used by both sexes at the same time. The same conduct could have occurred had the school built separate bathrooms for its male and female students. As for the darkroom, it must by definition be closed off from the main classroom in order to serve its function. The existence of the darkroom and of a single restroom, both contained within the high school classroom, did not subject plaintiffs to an inherently dangerous environment. *Compare White v. Rochford*, 592 F.2d 381, 384-85 (7th Cir. 1979) (children left in car on side of busy highway after state officer arrested the driver).

Plaintiffs also argue that school defendants increased their risks of harm by failing to report the abuse to plaintiffs' parents or other authorities. This argument stems in part from their assertion that defendants are under a state imposed duty to report abuse pursuant to 23 P.C.S.A. §§ 6311 and 6312 (1991). It is clear, however, that a violation of a state law duty, by

itself, is insufficient to state a § 1983 claim. *Brown*, 922 F.2d at 1113 (citing *Maine v. Thiboutot*, 448 U.S. 1 (1980)). Section 1983 liability arises only from a violation of federal statutory or constitutional rights under color of state law. *Id.*; *see also*, *Youngberg*, 457 U.S. at 330 (Burger, J., concurring). Thus, "'[i]llegality under the state statute can neither add to nor subtract from [the] constitutional validity [of a state's actions].'" *Archie v. City of Racine*, 847 F.2d 1211, 1216 (7th Cir. 1988) (quoting *Snowden v. Hughes*, 321 U.S. 1, 11 (1944)).[12]

We readily acknowledge the apparent indefensible passivity of at least some school defendants under the circumstances. Accepting the allegations as true, viz., that one school defendant was advised of the misconduct and apparently did not investigate, they show nonfeasance but they do not rise to the level of a constitutional violation. As in *DeShaney*, "[t]he most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." *DeShaney*, 489 U.S. at 203; *see also*, *Brown*, 922 F.2d at 1116 (Defendant "could and should have instructed [plaintiff] as to her rights under the [Prevention of Domestic Violence] Act.

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12. The same is true of plaintiffs' reliance upon alleged violations of other state law duties under the Pennsylvania School Code and the common law. *Stoneking v. Bradford Area School District*, 882 F.2d 720, 723 (3d Cir. 1989), *cert. denied*, 110 S.Ct. 840 (1990) (After *DeShaney*, "we can no longer rely on the statutory and common law duties imposed in Pennsylvania on school officials as the basis of a duty to protect students from harm occurring as the result of a third person.")

He was not, however, constitutionally compelled to do so.")

In sum, plaintiffs' allegations are insufficient to show, as required under *DeShaney*, that the school defendants either impermissibly limited the freedom of the plaintiffs to act on their own behalf, or barred their access to outside support. Nor do they demonstrate that defendants violated a constitutional duty by creating or exacerbating the danger posed by the student defendants. *See Brown*, 922 F.2d at 1116. It is not our province to say what the state responsibility is or should be in situations like the present. We do say that the Fourteenth Amendment does not automatically embrace such conduct.

C. State Established Policy, Custom or Practice

We read plaintiffs' amended complaints to assert a third theory of constitutional liability that is viable even in the absence of a special relationship duty. *Stoneking v. Bradford Area School District*, 882 F.2d 720, 725 (3d Cir. 1989), *cert. denied*, 110 S.Ct. 840 (1990) ("*Stoneking II*"). In *Stoneking II*, this court recognized that state defendants may be held liable for deliberately and recklessly establishing and maintaining a custom, practice or policy which caused harm to a student when a teacher sexually molested a student. We stated there that nothing in *DeShaney* "suggests that state officials may escape liability arising from their policies maintained in deliberate indifference to actions taken by their subordinates." *Id.* at 725. We emphasized that *DeShaney* was distinguishable because the abuse there "resulted at the hands of a private actor." *Id.* at 724.

We agree with the district court that this case lacks the linchpin of *Stoneking II*, namely, a violation by state actors. Sexual molestation committed by an agent of the state is readily distinguishable from the situation present here since the Due Process Clause itself imposes limitations on the state's conduct. Thus, § 1983 liability may not be predicated upon a *Stoneking II*-type theory because private actors committed the underlying violative acts.

Since we have concluded that plaintiffs failed to assert a constitutional claim under § 1983, the district court correctly determined that defendants Goode, Peters and Bazzel were entitled to a dismissal based on qualified immunity. *See, Siegert v. Gilley*, 111 S.Ct. 1789 (1991). It also properly dismissed the § 1983 claims against the other school defendants for failure to assert a federal claim.

D. Conspiracy to Deprive Plaintiffs of Constitutional Rights

Plaintiffs also charge that defendants engaged in a conspiracy to interfere with their civil rights in violation of 42 U.S.C. § 1985(3). In order to prevail, plaintiffs must show a conspiracy on the part of the school defendants to deprive them of equal protection or equal privileges and immunities motivated by "class-based, invidiously discriminatory customs and practices of failing to protect female students from sexual, physical and verbal abuse." Specifically, the amended complaints assert that the school defendants' acts in setting up the graphics arts classroom to include a darkroom and unisex bathroom

constituted a deliberate and reckless indifference to female students' rights.

We agree with the district court that plaintiffs failed to assert any facts from which any type of conspiratorial agreement between the school defendants and the student defendants can be inferred. Neither do the pleadings establish that the alleged discriminatory policies or practices were due to plaintiffs' membership in the class of female students. "[M]ere conclusory allegations of deprivations of constitutional rights," *Robinson v. McCorkle*, 462 F.2d 111, 113 (3d Cir.), *cert. denied*, 409 U.S. 1042 (1972), are insufficient to state a § 1985(3) claim. *Id.*

VI. CONCLUSION

No one could help but be shocked by the factual allegations in this case. But in *DeShaney* the Supreme Court rejected the "shock the conscience" test of *Rochin v. California*, 342 U.S. 165, 172 (1952), as a standard for imposing § 1983 liability. To do otherwise would readily convert much tortious conduct into constitutional violations at the expense of a decent regard for federalism. While the line is certainly blurred, we are not prepared to say that the conduct charged to the school defendants here crossed the line.[13]

In view of our affirmance of the district court's dismissal of the constitutional claims, we will also affirm the dismissal of the pendent state law claims.

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13. In view of our affirmance of the order of the district court dismissing the complaints, we need not decide whether different standards of culpability might apply among the school defendants.

The order of the district court will be affirmed.

SLOVITER, *Chief Judge*, *dissenting*, with whom Judge Mansmann, Judge Scirica and Judge Nygaard join.

The majority opinion is based on the premise that the types of relationships which can give rise to a constitutional duty of a state to protect its school children from harm from third parties is mandated by the Supreme Court's opinion in *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989). I believe that is too narrow a reading of *DeShaney*, and that the scope of the Due Process Clause's duty to protect, while limited, extends beyond the narrow compass of those persons involuntarily committed to prisons and mental institutions.

The majority reads this court's prior opinions as limiting the applicability of such a duty to situations in which the state has total and continuous custody of the individuals. I believe that our cases do not enunciate such a principle, that those cases arose out of fact patterns markedly different from the one presented here involving school children compelled to attend school on a regular basis, and that, in any event, as panel opinions they are not binding on this court when sitting in banc.

I believe that we are free to decide, as I would hold, that the state compulsion that students attend school, the status of most students as minors whose judgment is not fully mature, the discretion extended by the state to schools to control student behavior, and the pervasive control exercised by the schools over their students during

the period of time they are in school, combine to create the type of special relationship which imposes a constitutional duty on the schools to protect the liberty interests of students while they are in the state's functional custody.

I.

The majority does not address the question whether the plaintiffs adequately asserted a claim under the standards of culpability applicable to claims under 42 U.S.C. § 1983. That was the basis upon which the district court dismissed the complaint. Because I disagree with the majority's disposition of this case, I cannot avoid that issue and would hold that the complaint alleges a claim sufficient to withstand dismissal under Fed. R. Civ. P. 12(b)(6).

There is no question that D.R. has a liberty interest in "safety and freedom from bodily restraint." *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982). Focusing primarily on D.R., as the majority does, if the allegations in her complaint are true, she was subject to violent, sexual assault two to four times a week over a five-month period while attending school. App. at 225-26. D.R. alleges, *inter alia*, that the conduct included

> (a) Touching by the Perpetrator Defendants, and each of them, of the genital parts of minor Plaintiff;
>
> (b) Touching the breasts of minor Plaintiff;
>
> (c) Forcing and causing minor Plaintiff to masturbate the Perpetrator Defendants, and each of them;

(d) Causing and forcing minor Plaintiff to commit fellatio on the Perpetrator Defendants, and each of them;

(e) The commission of acts of sodomy on minor Plaintiff;

(f) Causing and forcing minor Plaintiff to watch and observe the Perpetrator Defendants, and each of them, perform similar offensive sex acts on one or more other female students in the graphics occupations classes;

(g) Causing and forcing minor Plaintiff to watch and observe the Perpetrator Defendants have offensive physical contact — apparently non-sexual — with one or more of the school teachers including, but not limited to, Defendant Peters.

App. at 225.

These allegations belie the majority's characterization of the conduct as "non-sexual pandemonium," Maj. typescript op. at 27, and its conclusion that harm from sexual assault was not a foreseeable risk. The most extreme sexual misconduct allegedly went on in a lavatory with an inside lock, designated as a unisex facility by school officials, that was part of the graphic arts classroom. D.R. alleges that the student teacher put in charge of that classroom, Susan Peters, witnessed daily the chaotic behavior that took place in her classroom and was present when the male students grabbed at D.R., touched her breasts, pushed her down, and dragged her into the bathroom. App. at 222, 226-28. The teacher's general reaction was to ignore the behavior or walk away. App. at 229. On one occasion Peters made

the students open the bathroom door when she knew a number of boys and girls were in there. App. at 228. Peters even commented once about "'those boys and their raging hormones.'" App. at 229. Apparently a videotape of the class was made by a male student which showed "open lewdness" while the teacher was sitting at her desk watching. App. at 222-23, 739-41.[1] The other school officials also knew about the situation in the graphic arts classroom and did not try to remedy it. App. at 230-32.

Thus, the complaint sufficiently alleges deliberate and reckless indifference by school officials to the safety and physical well-being of the students while they were in the functional custody of the school. *See Colburn v. Upper Darby Township*, 838 F.2d 663, 669-70 (3d Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989). However, since the harm was inflicted by other students, rather than by a school official, *cf. Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3d Cir. 1989) (*Stoneking II*), *cert. denied*, 493 U.S. 1044 (1990), I agree with the majority that the question here is whether it can be fairly stated that the state deprived D.R. of her liberty interest in "'freedom from . . . unjustified intrusions on personal security.'" *DeShaney*, 489 U.S. at 195 (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)). Phrased differently, the only issue before us is whether we can say, as a matter of law, taking all

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1. For example, D.R.'s complaint alleged that the boys filmed each other "touching and grabbing various parts of the female students' bodies, signs on which profanities were written, one of the [boys] 'mooning' the camera (*i.e.*, exposing his bared backside)." App. at 223.

of the allegations of the complaint as true, that the limited duty to protect encompassed in the Due Process Clause is inapplicable to public school children.

II.

In its holding in *DeShaney* that a minor who was returned by state agents to the custody of his father at whose hands he later suffered grievous harm could not maintain an action against the County and its agents, the Supreme Court emphasized that Joshua DeShaney suffered all of his injuries at the hands of and while in the custody of his father. The Court stated, "Petitioners concede that the harm Joshua suffered *did not occur while he was in the State's custody*, but while he was in the custody of his natural father, who was in no sense a state actor." *Id.* at 201 (emphasis added). In this case, unlike *DeShaney*, the harm was inflicted while the victim was in the state's custody and/or care.

The majority emphasizes the Court's language referring to the "affirmative act of restraining the individual's freedom to act on his own behalf," *id.* at 200, as the crux of *DeShaney*. However, as the majority itself recognizes, the Supreme Court stated that a duty to protect can arise from "the State's affirmative act of restraining the individual's freedom to act on his own behalf - through incarceration, institutionalization, *or other similar restraint of personal liberty . . . .*" *Id.* (emphasis added). The Court did not say "other similar types *of custody*," which it could easily have done if it had so meant. Involuntary custody is just one type of "limitation which [the State can]

impose[] on [an individual's] freedom to act on his own behalf." *Id.*[2]

DeShaney contains no language to support the majority's holding that the duty to protect can be triggered only by involuntary, round-the-clock, legal custody. Nothing in the opinion suggests that compulsory school attendance cannot qualify as the type of state restraint of personal liberty which gives rise to a duty to protect. As this court has previously recognized, "*DeShaney* requires that the state have imposed some kind of limitation on a victim's ability to act in his own interests." *Horton v. Flenory*, 889 F.2d 454, 458 (3d Cir. 1989). However, we continued, "While specifically referring to imprisonment and institutionalization . . . the [*DeShaney*] court acknowledges that other similar state-imposed restraints of personal liberty will trigger a state duty to prevent harm." *Id.* In fact, the *DeShaney* Court left open the possibility that the state might have a special relationship with a child it places in foster care, 489 U.S. at 201, n.9, even though it would no longer be the state that had the direct daily contact with the child.

Admittedly, in *DeShaney* the Court did focus upon the voluntariness *vel non* of the custody, *see* 489 U.S. at 200. Although a student is not held in school under shackles, there is substantial compulsion associated with schooling. Barring

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2. One commentator has suggested that "A proper analysis should look to the[] *implications* of custodial control, rather than only to the control itself, because it is the underlying dependency that actually obligates the state to act, not the state's legal status as custodian." *See* Note, *Affirmative Duties in the Public Schools after* DeShaney, 90 Colum. L. Rev. 1940, 1957 (1990).

unusual circumstances, school attendance up until the age of seventeen is mandatory in the state of Pennsylvania. Pa. Stat. Ann. tit. 24, §§ 13-1326, 1327 (Purdon 1962 & Supp. 1992); *In re D.M.*, 19 D & C.3d 514, 520 (1981).[3]

The majority of secondary school students are minors, and the law recognizes that their judgment may not be fully mature and developed: children cannot vote, U.S. Const. amend. XXVI; they cannot serve in the armed forces, 10 U.S.C. § 505(a) (1988); if arrested, they are tried in juvenile courts, 42 Pa. Cons. Stat. Ann. §§ 6301, 6322 (Purdon 1982 & Supp. 1992); and if pregnant, they must ask a parent for permission to have an abortion, 18 Pa. Cons. Stat. Ann. § 3206 (Purdon Supp. 1992).

During the school day, school officials exercise substantial control over students, either because they are considered to stand *in loco parentis* toward the students, Pa. Stat. Ann. tit. 24, § 13-1317 (Purdon Supp. 1992), or because proper discipline so requires. *Ingraham v. Wright*, 430 U.S. 651, 662 (1977). These rationales are frequently invoked by school officials in an attempt to claim immunity for their actions, *see New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985) (rejecting state's defense on ground that *in loco parentis* authority does not excuse school authorities from limits of Fourth Amendment), and also have been relied upon by the Supreme Court to recognize the special relationship between

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3. D.R. was sixteen at the time of the incidents alleged in their complaint. Although L.H. at seventeen may not have been compelled to attend school, I see no reason to draw an age distinction between students who, in fact, are attending a state school.

school officials and the students they supervise. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (recognizing "the obvious concern on the part of . . . school authorities acting *in loco parentis*, to protect children . . . from exposure to sexually explicit, indecent, or lewd speech").

In their capacity as "parents," school officials can exercise control over the movements of their students. In discussing the general acceptance of corporal punishment in public schools, Justice Powell, speaking for a majority of the Court, stated that "[t]he prevalent rule in this country today privileges such force as a teacher or administrator 'reasonably believes to be necessary for [the child's] proper control, training or education.'" *Ingraham*, 430 U.S. at 661 (quoting Restatement (Second) of Torts § 147(2) (1965)).

The majority minimizes the impact of compulsory education laws for reasons I find totally unpersuasive. The compulsory nature of public school attendance is not lessened by the fact that a few fortunate students have the option to attend private school or be educated at home. For the vast majority of children of school age, this is no choice at all. Their families are not in a financial position to fund a private school education.[4] Even fewer are in the rare position of being able to provide their children an adequate education at home.[5] Nor does the fact that parents

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4. Only 12 percent of the school-age population is enrolled in private schools. *See* Muriel Cohen, *A Schooling Tradition Turns 350 Today*, Boston Globe, April 14, 1992, at 24.

5. This is analogous to the court's discussion of choice versus compulsion in Lee v. Weisman, 60 U.S.L.W. 4723, 4727 (U.S. June 24, 1992), where the Court, rejecting the argument that

may remove a child from school for specified reasons, such as religious instruction, or participate in planning the education of a special education student mean that the child is in the parents' custody, rather than in the school's custody, for the period that s/he is in school.

I find inexplicable the majority's conclusion on the record before us that "the school defendants did not restrict D.R.'s freedom to the extent that she was prevented from meeting her basic needs." Maj. typescript op. at 19-20. In the complaint, D.R. claims that in order to avoid the situation in the classroom lavatory, she repeatedly requested a pass to use a different lavatory. Peters either ignored her or refused. App. at 228. As a result, D.R. was obliged by the actions of the school itself to use the unisex lavatory. Nor could D.R. have simply walked out of school without permission during school hours without calling into play the truancy laws. *See* Pa. Stat. Ann. tit. 24, § 13-1333, 1343 (Purdon 1962 & Supp. 1992). Moreover, counsel for Amicus Curiae, the Pennsylvania School Boards Association, conceded in the argument before us that the school would not have permitted D.R.'s mother to attend school to provide assistance or a watchful eye over the chaotic classroom conditions.

It is the majority's thesis that students, unlike prisoners, have meaningful access to sources of help. *See* Maj. typescript op. at 20. Yet the reluctance of children to disclose sexual abuse is

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there is no compulsion accompanying a high school graduation ceremony, stated "Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme."

generally acknowledged. *See Myers v. Morris*, 810 F.2d 1437, 1459-60 (8th Cir.) (noting "unique reluctance" of children to disclose sexual abuse), *cert. denied*, 484 U.S. 828 (1987); *Doe v. New York City Dept. of Social Servs.*, 709 F.2d 782, 785 (2d Cir.) (doctor testified that great majority of abused children deny abuse), *cert. denied*, 464 U.S. 864 (1983). Elementary school age children are unlikely to be sufficiently independent of the school authorities to complain promptly to their parents about constitutional deprivation occurring at school, and even older students may be in comparable situations. There is, at least, a factual issue presented in this case as to whether D.R. was in a position effectively to seek help. D.R. qualified as an "exceptional student," *see* Majority typescript op. at 5 n.5, because she is "almost totally hearing impaired" and "[h]er powers of articulation are seriously limited." App. at 744.[6]

D.R. alleges that she was *unable* to disclose the assaults because of her disability and her fear. *See* app. at 232. In a poignant revelation of her vulnerability, D.R. stated that she was afraid that if she complained about the brutality to anyone and was removed from the classroom, she would have nowhere to go. App. at 232, 746. Presumably her fear arose from the fact that she had already been removed from a regular public school to go to this vocational school. The fact is that she suffered these indignities for many months before telling anyone.

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6. These facts appear in the record of the juvenile hearing before the state judge at which the perpetrators were found to be delinquent. The transcript of the state proceeding was attached to defendants' motion to dismiss.

Unless custody is limited to incarceration and involuntary institutionalization (and the *DeShaney* language suggests otherwise), the duty of state entities to protect those already within their charge should be broad enough to extend at least to young children and those who, because of disability or other impairment, are not likely to seek assistance promptly. In fact, prisoners are probably much more articulate about their complaints about mistreatment than are school children, particularly when the treatment consists, as in this case, of sexual abuse.

Moreover, in *DeShaney* the Court emphasized the relevance of the State's responsibility in placing the person in a position of danger. The Court stated,

> Petitioners concede that the harm Joshua suffered did not occur while he was in the State's custody, but while he was in the custody of his natural father who was in no sense a state actor. *While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.* That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, *it placed him in no worse position than that in which he would have been had it not acted at all*; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.

489 U.S. at 201 (footnote omitted; emphasis added).

The *DeShaney* opinion is in line with Supreme Court cases that decline to impose upon state entities a constitutional duty to come to the aid of the vast general public. As the Court stated, the Due Process Clause does not "impose an affirmative obligation on the State to ensure that [the life, liberty and property of its citizens] do not come to harm *through other means*." *Id.* at 195 (emphasis added). Even knowledge that an identified victim, as distinguished from the public at large, faced a danger does not give rise to an affirmative duty. *DeShaney*, 489 U.S. at 198 n.4. *See Brown v. Grabowski*, 922 F.2d 1097, 1113-16 (3d Cir. 1990) (no constitutional liability for police who failed to come to aid of individual who had alerted police of potential danger at hands of prior assailant), *cert. denied*, 111 S. Ct. 2827 (1991). Nor is there any liability on the state for unanticipated, albeit possibly foreseeable, harm caused by a furloughed prisoner. *See Martinez v. California*, 444 U.S. 277, 284-85 (1980); *Commonwealth Bank & Trust Co. v. Russell*, 825 F.2d 12, 14-17 (3d Cir. 1987). Such open-ended duties would impose upon the states almost infinite liability.

D.R. was in a vastly different situation because her injury did not come about exclusively through "other means." Unlike the state's claim in *DeShaney* with respect to the harm to Joshua, the School District cannot claim that it did not play some role in creating the danger to D.R. or making her "more vulnerable." Here, it was the school that designed the unisex lavatory in the classroom; it

was the school that refused to allow D.R. to use another lavatory; it was the school that hired an inexperienced student teacher; and it was the school that tolerated the chaotic behavior and the sexual aggressiveness of the students. Therefore, we cannot reasonably conclude at this juncture of the case that the harm to D.R. came about by means apart from the state.

III.

I am also not convinced that our own case law since *DeShaney*, even if binding, compels the result reached by the majority. To the contrary, as the majority opinion recognizes, whether school children are in state custody while attending public school has been an open question in this circuit. *See* Maj. typescript op. at 15; *Stoneking II*, 882 F.2d at 724; *see also Horton*, 889 F.2d at 458 (recognizing that although *DeShaney* specifically referred to imprisonment and institutionalization, "other similar state-imposed restraints of personal liberty will trigger a state duty to prevent harm").

It is clear that in *Philadelphia Police & Fire Ass'n v. City of Philadelphia*, 874 F.2d 156, 168 (3d Cir. 1989), where we held that there was no affirmative state duty to provide services to the mentally retarded who were living at home, the withdrawal of the state's services affected persons who were not at that time within any form of state custody, functional or legal. Thus our statement that "the state continues to owe an affirmative duty to protect those physically in its custody," *id.* at 167, did not imply that total legal custody is the only situation giving rise to an affirmative duty. Similarly, our statement, quoted by the majority, that we did not believe that "intermittent custody

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gives rise to an affirmative duty on the state's part," *Id.* at n.9, referred to the affirmative duty to provide services to the mentally retarded living at home, not to the state's affirmative duty of protection when it actually had functional custody.

Also relied upon by the majority is *Fialkowski v. Greenwich Home for Children, Inc.*, 921 F.2d 459 (3d Cir. 1990). In that case a mentally retarded individual voluntarily residing in a community living arrangement (CLA) to which he was referred by defendant choked to death while eating. Damages were sought under section 1983 from the base mental health service unit (Northeast) which had referred Fialkowski to the CLA. We upheld summary judgment for Northeast on the state law claims because nothing more than simple negligence was shown. *Id.* at 464. Of course that would also have been dispositive of the section 1983 claim. *See Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986) (where government official is merely negligent in causing injury, due process is not implicated). We proceeded to hold both that *DeShaney* precluded recovery under section 1983 because the state owed no affirmative duty of care to a retarded adult *voluntarily* placed in a state institution and that there was no basis for imposition of supervisory liability. Inasmuch as there was no state compulsion that Fialkowski be in state custody, the application of *DeShaney* to Fialkowski's case is wholly distinguishable from the case of children compulsorily in school.

The only cases in this court presenting the issue of the application of a duty of care to school children are *Stoneking v. Bradford Area Sch. Dist.*, 856 F.2d 594 (3d Cir. 1988)(*Stoneking I*), *vacated sub nom. Smith v. Stoneking*, 489 U.S. 1062

(1989), and *Stoneking II*, 882 F.2d 720 (3d Cir. 1989). It is clear from reading *Stoneking II* that this court did not hold that *DeShaney* precluded the application of a special relationship between the state entity and school children. In fact we said, "Arguably, our earlier discussion noting that 'students are in what may be viewed as functional custody of the school authorities' during their presence at school because they are required to attend under Pennsylvania law, *see* [*Stoneking I*] 856 F.2d at 601 (citing 24 Pa.Stat.Ann. § 13-1327 (Purdon Supp. 1988)), is not inconsistent with the *DeShaney* opinion." *Stoneking II*, 882 F.2d at 723.

Although we also stated that we could no longer rely on the affirmative duties of care and protection imposed *by the state* on its agents, the school district and its employees, which had been one of the bases of *Stoneking I*, we did not preclude the possibility of a constitutional duty on the school district to protect school children, compelled by state law to attend school.[7] *Id.* at 723-24. It follows therefore that in the absence of

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7. The statement in *Fialkowski* that in *Stoneking II* "this court recognized that 'an affirmative constitutional duty to provide adequate protection' must be confined to cases in which a person is taken into state custody against his will." 921 F.2d at 466, is simply without support in *Stoneking II*. Nothing on the page in *Stoneking II* cited in *Fialkowski* for that proposition, so states. *See* 882 F.2d at 723. The only arguably relevant reference is the discussion that *DeShaney* stated that "'when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.'" *Id.* (quoting *DeShaney*, 489 U.S. at 199-200). As I have already noted, this is a far cry from stating that the constitutional duty must be confined to such instances. *See supra* p.5.

further elucidation by the Supreme Court of the parameters of the duty to protect discussed in *DeShaney*, this court is free to interpret whether there is such a duty in light of generally applicable legal principles.

IV.

The majority's restrictive view of the "special relationship" first posited in *Martinez* is particularly troubling, not only because it is based on the erroneous premise that its decision is compelled by precedent but also because it is so sweeping that it is unlikely that any state-imposed restraint of personal liberty short of incarceration or involuntary commitment will trigger the duty to protect. As a result, substantive due process protection from injuries like those at issue is irretrievably lost for all others, including school children, even though the state both created the children's dependency on the state institution by virtue of laws compelling them to attend and maintains the environment within that institution that played a direct role in the harm ultimately caused.

There is no doubt that this case falls between *DeShaney* and *Estelle/Youngberg*. I would be more cautious than is the majority in stepping in the direction of complete abandonment of recourse to substantive due process. As Justice Powell has written, "Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.'" *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality

opinion) (quoting *Griswold v. Connecticut*, 381 U.S. at 501 (Harlan, J., concurring)).

Of course, as Justice Powell noted in *Moore*, "[t]here are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of more specific provisions in the Bill of Rights . . . . [This] counsels caution and restraint." *Id.* at 502. But a state official's potential liability for violations of substantive due process has already been circumscribed by decisions imposing high standards of culpability, *see Davidson*, 474 U.S. at 347-48, limitations on the type of conduct for which state entities can be held responsible, *see City of Canton v. Harris*, 489 U.S. 378, 385-92 (1989), and qualified immunity for individual defendants. *See Harlow v. Fitzgerald*, 457 U.S. 800, 813-20 (1982). These decisions make it unlikely that a holding that schools have a duty to protect school children while they are in the functional custody of the school will markedly expand the liability of the school districts.

Thus, in this case I would find that the plaintiffs have sufficiently pled facts alleging a breach of the duty to protect triggered by the special relationship that arises between vulnerable school children and their public schools. Therefore, I need not decide the contours of the duty in all situations except to note that the extent of such a duty would necessarily be commensurate with the lesser custody exercised by schools over school children than prisons over inmates. Of course, there may be situations where the school can show that the premises underlying the duty to protect were inapplicable to particular students who, because of their maturity or other circumstances, could

have effectively secured help.[8] Unless that is shown, then we owe immature school children attending public school who are seriously injured as a result of a policy of deliberate indifference to their danger no less a remedy than we are willing to provide to incarcerated criminals.

BECKER, *Circuit Judge*, dissenting.

I agree with most of Chief Judge Sloviter's analysis, but write separately because I do not agree that we should adopt a bright-line rule imposing on schools a "constitutional duty to protect . . . the liberty interests of students while they are in the state's functional custody." [Dissenting Opinion, Typescript at 2]. In my view, this case does not require such a broad rule, and I would not advocate adopting one.[1] Instead, I believe that the unique circumstances of this case imposed a constitutional duty on the school to protect the students' liberty interests for a combination of reasons: state law compelled the student to attend school; the student, by reason of her disability, lacked the capacity for mature judgment; and the school took affirmative steps to confine the student to situations where she was

8. *Cf.* Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972, 2979 (1990) (judicial bypass procedure in statute requiring parental consent to abortion for minor can require demonstration of minor's maturity).

1. One could read Chief Judge Sloviter's later statement that she "need not decide the contours of the duty in all situations" and her accompanying explanation [Dissenting Opinion, Typescript at 18] as diluting that rule, but I take her discussion on page 2 at face value.

physically threatened. Although I do not believe that such a duty arises in every school situation, I have no difficulty deciding that it did arise here, where the school knowingly confined D.R. to a dangerous unisex bathroom and a chaotic classroom where she was repeatedly assaulted. Based on all of the circumstances present in this case, I would reverse the judgment of the district court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 91-1136 and 91-1137

D.R., a minor child, by her parent
and natural guardian, L.R., and L.R.,
individually and in her own right,

Appellants, No. 91-1136

v.

MIDDLE BUCKS AREA VOCATIONAL TECHNICAL SCHOOL; WILLIAM GOODE; JAMES C. BAZZEL; MARTHA RICHINO; SUSAN PETERS; BUCKS COUNTY INTERMEDIATE UNIT NO. 22; CHRISTINA TUTTLE; PENN RIDGE SCHOOL DISTRICT; CHARLES FAMBRO; FRED FREEMAN; JAMES A. GALLAGHER; BRIAN MILLER; MARC R. RATCLIFFE; JAMES M. SPERLING; LESTER SUTPHIN

and

L.H., BUCKS COUNTY, PENNSYLVANIA,

Appellant, No. 91-1137

v.

MIDDLE BUCKS AREA VOCATIONAL TECHNICAL SCHOOL; AND WILLIAM GOODE AND JAMES C. BAZZEL AND MARTHA RICHINO AND SUSAN PETERS AND JAMES A. GALLAGHER AND BRIAN MILLER AND MARC R. RATCLIFFE AND JAMES M. SPERLING AND LESTER SUTPHIN

Appeals from the United States District Court
for the Eastern District of Pennsylvania

D.C. Civil Nos. 90-03018 and 90-03060

Before: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and SEITZ, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel July 16, 1991 and reargued before the Court *in banc* May 6, 1992.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered February 4, 1991, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

Dated: August 11, 1992